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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 304

THE PEOPLE OF THE STATE OF NEW YORK, PETITIONERS,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF EXPERIMENTER PUBLISHING CO., INC., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(37,001)

(37,001)

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[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

46582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt; THE PEOPLE OF THE STATE OF NEW YORK, Appellant; IRVING TRUST COMPANY, as Trustee in Bankruptcy, Appellee

STATEMENT

The Experimenter Publishing Co., Inc., was adjudicated bankrupt March 6th, 1929. Irving Trust Company has been duly appointed trustee.

On July 1st, 1929, an order was made by the District Court of the United States for the Southern District of New York requiring the People of the State of New York to file any claim for taxes which it might have against the bankrupt within sixty days after service of a copy of the said order. Said order, with notice of entry was duly served July 18th, 1929.

On March 29th, 1929, the State of New York filed with the referee in bankruptcy a notice of an unliquidated claim printed herein as "Claim A."

[fol. 2] On October 20th, 1929, the State of New York filed a further notice of an unliquidated claim printed herein as "Claim B."

On or about March 30th, 1931, the trustee moved before the referee to expunge the claims of the State as filed. The referee granted the motion to expunge as to the certain notice of an unliquidated claim for taxes dated October 17th, 1929, and filed October 20th, 1929, and an order and judgment of the referee accordingly was made and entered September 2nd, 1931.

The People of the State of New York then petitioned for a review of the order and judgment of the referee and prayed for a modification thereof by denying the application of the trustee to expunge the notice of unliquidated claim filed October 20th, 1929.

The review came on before Hon. Frank J. Coleman, D. J. and the order and judgment of the referee was in all respects affirmed.

The People of the State of New York thereupon took and perfected the appeal herein.

The People of the State of New York appeared in the proceedings below and now appear by John J. Bennett, Jr., Esq., Attorney General of the State of New York.

The trustee appeared in the proceedings below and now appears by S. John Block, Esq. and Root, Clark, Buckner, Howland & Ballantine.

Final distribution of the estate of the bankrupt has not as yet taken place.

[fol. 3] In United States District Court, Southern New York

Present: Hon. Frank J. Coleman, District Judge.

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Order Appealed From—Dec. 4, 1931

A petition, verified September 17, 1931, having been filed herein on September 18, 1931, by the Department of Taxation and Finance of the State of New York, to review the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy herein, dated September 2, 1931, denying a motion by Irving Trust Company, the Trustee herein, to expunge a notice of unliquidated claim of the State of New York for taxes dated March 29, 1929, and granting said motion as to a notice of unliquidated claim of the State of New York for taxes dated October 17, 1929, and expunging said last-mentioned notice.

Now, upon reading the notice of said motion, dated March 30, 1931, the affidavit of Robert L. Smith, verified March 30, 1931, the said notices of claim dated March 29, [fol. 4] 1929, and October 17, 1929, respectively, the tax bar order, dated July 1, 1929, copies of which said notices of claim and tax bar order are annexed to said affidavit of Robert L. Smith, the testimony taken before said Referee on behalf of the State of New York, and the exhibits re-

ceived in evidence on behalf of the State of New York, in opposition to said motion, the two orders of Hon. Peter B. Olney, Jr., Referee, each dated April 10, 1929, confirming the sale of the assets of the bankrupt and the papers on which said orders were made, consisting of the petition of Irving Trust Company, verified April 10, 1929, and the two exhibits annexed to said petition, the schedule of the Referee, Hon. Peter B. Olney, Jr., of claims filed herein, dated September 20, 1929; the opinion of the said Referee, dated August 20, 1931, and the order of the said Referee, dated September 2, 1931; the petition, verified September 17, 1931, to review said order and the notice of motion, dated September 25, 1931, and returnable before this Court September 30, 1931.

And after hearing John J. Bennett, Jr., Attorney General of the State of New York (Anthony P. Ludden of counsel) in support of said petition to review, and S. John Block, one of the attorneys for Irving Trust Company, the Trustee herein, in opposition to said petition, and after due deliberation and upon filing the opinion of this Court, dated November 10, 1931, it is

Ordered that the said order of Hon. Peter B. Olney, Jr., Referee herein, dated September 2, 1931, be and it hereby [fol. 5] is in all respects affirmed, and it is further

Ordered that the said petition to review filed herein on September 18, 1931, be and the same is hereby dismissed.

Frank J. Coleman, D. J.

In United States District Court

Present: Honorable Peter B. Olney, Jr., Referee.

[Title omitted]

Order and Judgment of the Referee—Sept. 2, 1931

Irving Trust Company, the Trustee of the above-named bankrupt, having made a motion for an order striking from the files of the Referee in Bankruptcy in the above-entitled [fol. 6] matter two certain notices each entitled "Notices of unliquidated claim of State of New York for taxes" dated March 29, 1929, and October 17, 1929, respectively

and cancelling and expunging said notices and directing the said Trustee herein to disregard said notices or any claims filed in support thereof and for such other, further or different relief as the Court should deem just and proper,

Now, upon reading and filing the notice of said motion dated the 30th day of March, 1931, and returnable before me on the 9th day of April, 1931, at 3:30 o'clock in the afternoon, the affidavit of Robert L. Smith verified the 30th day of March, 1931, and copies of said notices marked respectively "Exhibit A" and "Exhibit B" annexed to said affidavit and notice of motion, and a copy of the tax bar order herein dated July 1, 1929, annexed to said affidavit and notice of motion and marked "Exhibit C", and upon reading the originals of said two notices and of said tax bar order which are on file in the office of the Referee in Bankruptcy in this matter, all in support of said motion, and testimony having been duly taken on behalf of the State of New York in opposition to said motion and upon reading and filing said testimony and said motion having been duly argued before me on the aforementioned return date thereof and on subsequent dates to which the argument of said motion was duly adjourned, and after hearing S. John Block, one of the attorneys for the Irving Trust Company, Trustee of the above-named bankrupt, in sup- [fol. 7] port of said motion and John J. Bennett, Jr., Attorney General of the State of New York (Anthony P. Ludden of counsel) in opposition to said motion, and after due deliberation and upon filing the opinion dated August 20, 1931, of the Referee upon said motion, it is

Ordered that said motion be and it hereby is denied as to the certain notice of an unliquidated claim of the State of New York for taxes dated March 29, 1929, and filed in the office of the Referee in Bankruptcy herein, which said last mentioned notice relates to an unliquidated claim for franchise taxes against the above-named bankrupt for the tax years beginning November 1, 1928, together with interest, and that said motion be and it hereby is granted as to the certain notice of an unliquidated claim of the State of New York for taxes dated October 17, 1929, and filed in the office of the Referee in Bankruptcy herein, which said last mentioned notice relates to an unliquidated claim for franchise taxes against the above-named bankrupt for the tax years

beginning November 1, 1928, and to an unliquidated claim for additional franchise taxes as imposed by Section 219 d, Article 9 of the Tax Law of the State of New York, for the tax years beginning November 1, 1917, to 1928, inclusive, together with interest and that said last mentioned notice hereby is cancelled and expunged, and the said Trustee of the above-named bankrupt is hereby directed to disregard [fol. 8] said last mentioned notice and any claims filed in support thereof.

Peter B. Olney, Jr., Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the claimant, The People of the State of New York, by John J. Bennett, Jr., their solicitor and Attorney-General of the State of New York, and in connection with their petition for appeal say that in the record of proceedings and in the order made therein, dated the 4th day of De- [fol. 9] cember, 1931 and entered in the office of the Clerk of this Court on the 9th day of December, 1931, manifest error hath intervened to the prejudice of said claimant-appellant, as follows:

First. That the Court erred in confirming the order of the Referee, Hon. Peter B. Olney, Jr., dated September 2, 1931, cancelling and expunging a claim of the State of New York for an unliquidated franchise tax liability for the tax year beginning November 1, 1928, and in cancelling and expunging an unliquidated claim for additional franchise taxes, as imposed by §219-d of the Tax Law of the State of New York for the tax years beginning November, 1917 to November, 1928, inclusive, together with interest, said expunging and cancelling of said claims being made by the Court and the Referee herein upon the ground and for the sole reason that said claims were filed one month and twenty days after the expiration of the time limited for filing of said claims in a bar order made by this Court on the first day of July, 1929, whereas, in law and in fact, at the time of the filing of said claims no final distribution of the estate of said bankrupt

had been made; that there was more than sufficient assets remaining undistributed to take care and provide for the payment of said claims in full; that the legal effect of the bar order of this Court was limited solely to preventing the State of New York from filing any additional claims after the period of distribution of the bankrupt's estate; that it was the duty of the Referee in bankruptcy herein to receive and file any claim of the State of New York prior to the time of [fol. 10] actual distribution of the bankrupt's estate; that the claims of the State of New York, cancelled and expunged herein, were duly filed with the Referee in Bankruptcy herein prior to the time of distribution of the bankrupt's estate, and that upon the filing of said claim it became the duty of the Referee in bankruptcy herein to audit and adjust the franchise taxes of the State of New York due from the bankrupt herein for the tax years for which said claims were filed, in accordance with the net income of the said bankrupt as returned to the United States Treasury Department and as changed or corrected by the Commissioner of Internal Revenue or other officer of the United States or other competent authority, and that, if it should be determined by the Referee in bankruptcy that additional net income for the tax years in question was taxable as aforesaid, that the amount of additional franchise taxes due by the bankrupt to the State of New York for the tax years in question be settled and determined, and the amount thereof, with interest at the rate of six per cent per annum from the respective due dates thereof to the date of payment, be allowed as a preferred claim due to the State of New York and directed to be paid as such.

Second. The Court erred in holding that the effect of the filing of the claims of the State of New York, which were expunged and cancelled herein, was to delay distribution of the bankrupt's estate and hence should be cancelled and expunged because filed after the time limited in the bar order [fol. 11] of July 1, 1929, and whereas, in law and in fact, upon the filing of said claims, it became the duty of the Referee in Bankruptcy herein to audit, state and correct the true amount of the net income of the bankrupt corporation for the tax years for which said claims were filed, and to take and state the true account and liability of said bankrupt's corporation for taxes both to the United States Government and to the State of New York. That such determination

could be made expeditiously by the Referee in bankruptcy herein, and that no unnecessary delay has been occasioned in the final making of distribution herein because of the fact that the claim of the State of New York for such additional franchise taxes was filed herein one month and twenty days after the expiration period in the bar order of July 1, 1929.

Third. That the Court erred in expunging the claims of the State of New York hereinbefore specified in the Assignment of Errors because of the fact that the same were filed one month and twenty days after date of expiration in the bar order of July 1, 1929; because of the fact that the District Court had no authority or power by any bar order to effect or limit the taxing power either of the State of New York or of the United States Government, or to limit or effect the collection of any taxes lawfully due and owing by the bankrupt to either the State of New York or the United States Government. The power of the District Court of the United States to limit the filing of claims before final judicial [fol. 12] distribution of the bankrupt's property was limited in scope merely to private individuals, firms and corporations, and did not extend to State sovereignties or to the sovereignty of the government of the United States; that if, in truth and in fact, there were any addtional taxes due by the bankrupt to the State of New York under §219-d of the Tax Law of the State of New York, it was the duty of the trustee and of the Referee to inquire and ascertain the existence of any liability for such taxes and to have said liability stated and determined and paid.

Wherefore the claimant-appellant prays that the order of the United States District Court for the Southern District of New York, dated the 4th day of December, 1931, and entered in the office of the Clerk of this Court on the 9th day of December, 1931, confirming the above-mentioned order and judgment of the Referee, dated September 2, 1931, be reversed for the errors aforesaid and for the other errors in the record and proceedings aforesaid, and that the said order by the said Referee, dated September 2, 1931, insofar as the same expunges a notice of unliquidated claim of the State of New York for taxes dated October 17, 1929, be reversed; that the motion of the Trustee in bankruptcy herein to expunge said notice of unliquidated claim be

denied; that the Referee in bankruptcy herein be directed to ascertain the correct amount of net income of the bankrupt herein for the tax years for which said unliquidated claim of the State of New York was filed and, in accordance [fol. 13] with the income thus ascertained, ascertain and state the amount of additional franchise taxes, if any, due to the State of New York pursuant to §219-d of the Tax Law of the State of New York for the tax years for which said unliquidated claim was filed, and that the amount thereof thus ascertained, with interest at the rate of six per cent per annum from the date when said additional taxes became due and payable to date of payment, be allowed to the claimant, The People of the State of New York, as a preferred claim and directed to be paid as such.

Wherefore the claimant, The People of the State of New York, prays for such other and further relief as to the Court may seem just and proper.

Dated New York, Dec. 15, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Appellant. Office & P. O. address: Capitol, Albany, New York.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER LIMITING TIME TO FILE CLAIMS

Upon reading and filing the annexed petition of Irving Trust Company, verified the 29th day of June, 1929, upon the involuntary petition in bankruptcy filed herein, upon the order of adjudication entered herein, and upon all papers filed and proceedings heretofore had herein, it is, on motion of Root, Clark, Buckner, Howland & Ballantine, and S. John Block, attorneys for the Trustee herein,

Ordered that the State of New York, through its Department of Taxation and Finance, be and it hereby is required to file in the office of Honorable Peter B. Olney, Jr., Referee in Bankruptcy, at No. 7 Dey Street, in the Borough of Manhattan, City of New York, within sixty days after the service of a copy of this order, with notice of entry thereof, proof

of any and all claims which the State of New York may have against the estate of the above-named bankrupt; and it is further

Ordered that upon failure of the State of New York to file such a claim within the time hereinabove specified, the [fol. 15] State of New York be and it hereby is forever barred from asserting any claim against the estate of the above-named bankrupt, or against the Trustee herein or against the funds in the hands of the Trustee; and it is further

Ordered that a copy of this order and the petition upon which the same is granted, with notice of the entry of said order, be served upon Maurice A. Stephenson, Deputy Commissioner in charge of New York City Office of the State Tax Commission, and upon Charles A. Curtin, Attorney for the State Tax Commission of the State of New York, and that proof of due service thereof be filed with the Referee herein.

Dated New York, N. Y., July 1, 1929.

Peter B. Olney, Jr., Referee in Bankruptcy.

[fol. 16] In United States District Court

[Title omitted]

Petition of Trustee Upon Which Order Limiting Time to File Claims Was Made

To Honorable Peter B. Olney, Jr., Referee in Bankruptcy:

The petition of Irving Trust Company respectfully shows:

1. That it is the duly qualified and acting Trustee of the above-named bankrupt.

2. That payment of a dividend of 25% was ordered on June 10, 1929, in this matter and that further dividends will be declared in the near future.

3. The State of New York has not as yet filed any claim for income taxes or other taxes and your petitioner has no way of determining the amount of such claim, if any, unless the State shall file such claim.

4. Unless all priority claims shall be determined within the near future the liquidation of the estate and payment

of further dividends to the general creditors will be materially delayed.

[fol. 17] 5. Your petitioner will be liable for the payment of the priority claims if the general creditors are paid without such priority claims having been determined.

Wherefore your petitioner prays that an order be made and entered herein directing that the State of New York, through its Deputy Commissioner, file a proof of claim within a definite time to be specified by this Court, otherwise and in default of filing such a claim the State of New York be forever barred and foreclosed from participation in the assets of this estate.

No previous application for this order has been made to any court or judge.

Dated New York, New York, June 29, 1929.

Irving Trust Company, by G. Gardner, Assistant Vice-President.

Duly sworn to by Gustav Gardner. Jurat omitted in printing.

[fol. 18] In United States District Court

[Title omitted]

Claim A of State of New York

Please take notice that the State of New York has an unliquidated claim for franchise taxes against the above named bankrupt for the tax years beginning November 1, 1928, together with interest, the exact amount of such taxes and interests being unknown at the date hereof. Claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to [fol. 19] fix and determine such tax or taxes.

Please take notice that annexed hereto is a Notice of Unliquidated Claim for Franchise Taxes due the State of New York and for which the State of New York claims a preference over and above all the debts of the said bankrupt and claims submitted to you.

Dated 3/29/29.

Hamilton Ward, Attorney General of the State of New York. Office and Post Office address: Albany, N. Y.

In United States District Court

[Title omitted]

Claim B of State of New York—Filed Oct. 20, 1929

Please take notice that the State of New York has an unliquidated claim for franchise taxes against the above named bankrupt for the tax years beginning November 1, 1928, also additional franchise taxes as imposed by Section [fol. 20] 219d, Article 9a, of the Tax Law for tax years beginning November 1, 1917, to 1928, inclusive together with interest, the exact amount of such taxes and interests being unknown at the date hereof. Claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes.

Please take notice that annexed hereto is a Notice of Unliquidated Claim for Franchise Taxes due the State of New York and for which the State of New York claims a preference over and above all the debts of the said bankrupt and claims submitted to you.

Dated 10/17/29.

Hamilton Ward, Attorney General of the State of New York. Office and Post Office: ——.

[File endorsement omitted.]

[fol. 21] In United States District Court

[Title omitted]

Trustee's Notice of Motion to Expunge Claims

Sir: Please take notice that upon the annexed affidavit of Robert L. Smith, verified the 30th day of March, 1931, a motion will be made before Hon. Peter B. Olney, Jr., Referee in Bankruptcy herein, at his office, No. 7 Dey Street, in the Borough of Manhattan, City of New York, on the 9th day of April, 1931, at 3:30 o'clock in the afternoon or as soon thereafter as counsel can be heard, for an order striking from the said Referee's file herein two certain no-

tices each entitled "Notice of Unliquidated Claim of State of New York for Taxes," dated March 29th, 1929, and October 17, 1929, respectively, and heretofore filed herein, copies of which notices are annexed hereto and are marked "Exhibit A" and "Exhibit B", respectively, and cancelling and expunging said notices and directing the Trustee herein to disregard said notices or any claims filed in support thereof and for such other, further or different relief as the Court may deem just and proper.

[fol. 22] Dated New York, March 30th, 1931.

Yours, etc., S. John Block and Root, Clark, Buckner and Ballantine, Attorneys for Irving Trust Company, Trustee, 225 Broadway, New York, N. Y.

To Hon. John J. Bennett, Jr., Attorney General of the State of New York, Albany, New York.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ROBERT L. SMITH, READ IN SUPPORT OF MOTION TO EXPUNGE CLAIMS

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert L. Smith, being duly sworn, deposes and says:

[fol. 23] I am an Assistant Vice-President of Irving Trust Company, Trustee in Bankruptcy of the above-named estate.

There are now on file in the office of Honorable Peter B. Olney, Jr., Referee in Bankruptcy herein, a claim and two notices of unliquidated claims of the State of New York for taxes due from the bankrupt. The claim, filed on March 29, 1929, is for unpaid franchise taxes amounting to $1,372.37. Said claim has been objected to and is awaiting determination. It is not in any way involved in this motion. At the same time there was filed a "Notice of Unliquidated Claim of State of New York for Taxes," dated March 29, 1929, a copy of which notice is annexed hereto and made part hereof and marked "Exhibit A."

On October 20, 1929, a further "Notice of Unliquidated Claim of the State of New York for Taxes" was filed, which notice set forth an intention to file a claim for the same tax described in the notice of March 29, 1929, and also stated an additional claim for additional franchise taxes for tax years beginning November 1, 1917, to 1928, inclusive. A true copy of said second notice is annexed hereto and made part hereof and marked "Exhibit B."

Experimenter Publishing Co., Inc., was adjudged bankrupt on March 6, 1929. The period within which claims [fol. 24] could have been filed expired on September 6, 1929. The second notice herein was filed after the expiration of the six months within which claims could be filed.

On July 18, 1929, copies of a Tax Bar Order herein dated July 1, 1929, with notice of entry thereof and copies of a petition herein, dated June 29, 1929, upon which said order was made, were duly served upon Charles A. Curtin, Attorney for the New York State Tax Commission, and upon Maurice A. Stephenson, Deputy Commissioner, New York State Tax Commission, requiring the State of New York through its Department of Taxation and Finance, to file in the office of Honorable Peter B. Olney, Jr., Referee in Bankruptcy, within 60 days after the service of a copy of said order with notice of entry, proof of any and all claims which the State of New York may have against the estate of the above named bankrupt and further ordering that upon the failure of the State of New York to file such a claim within the time specified, the State of New York be forever barred from asserting any claim against the estate of the above named bankrupt or against the Trustee herein or against the funds in the hands of the Trustee. Said 60 day period expired on September 16, 1929. The second notice was therefore filed more than one month after the expiration of the 60 day period allowed by the tax bar order. Annexed hereto and made part hereof and marked respectively "Exhibit C" and "Exhibit D" are [fol. 25] true copies of the said Tax Bar Order and of the said petition upon which said order was duly made herein by the Referee herein on July 1, 1929.

It should be noted that in this case the sixty day period provided by the Tax Bar Order expired subsequent to the expiration of the six months' period within which claims should have been filed. No proof of any claim of the State

of New York has been filed herein, either within either of said periods or at any other time except the said claim for $1,372.37.

Since the filing of said "Notices of Unliquidated Claim" the State has never filed a proof of claim in support of said notices nor has it taken any step to indicate to the Trustee the exact amount of the alleged liability, if any, of the bankrupt for taxes to the State. The Trustee is in ignorance of the amount of the claim, if any, of the State of New York for alleged unpaid taxes. The State itself does not know the amount of its claim, if any. At the time the State Tax Commission filed the second notice of claim, it addressed a letter, dated October 18, 1929, to Hon. Peter B. Olney, Jr., Referee in Bankruptcy herein, enclosing the said second notice and stating: "These latter assessments (for the tax years beginning November 1, 1917, to 1928) have not as yet been computed, owing to the failure of the bankrupt to supply the necessary information as the statute directs". The Trustee, itself, is unable to give the [fol. 26] State Tax Commission any information regarding the business transactions of the bankrupt prior to the adjudication of March 6, 1929, for the reason that all the properties of the bankrupt, including all its books of account, records, tax returns and balance sheets were sold to Experimenter Publications, Inc., by order of this Court, dated April 10, 1929. Pursuant to said order all of said books and records have been delivered to said purchaser and said books and records are no longer in the control or possession of the Trustee and have not been in the Trustee's control or possession since the State Tax Commission has indicated that it wants information to recompute the assessments for the tax years beginning November 1, 1917 to 1928, inclusive. The Trustee herein has no information whatsoever to give to the State Tax Commission to enable it to compute assessments due, if any.

The notices themselves state that the exact amount of such taxes and interest are not known by the State and that the claim will be filed if and when the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes. By its own admission the State has not the necessary information to file a claim. As has already been stated, the Trustee is not able to furnish the necessary in-

formation. With all avenues of information closed, the State has sat by idly and delayed the prompt administration of the estate.

[fol. 27] The State is not in the position of a sovereign whose attempts to fix and collect taxes are being opposed and frustrated by one who hopes to evade and escape liability therefor. Taxes have already been computed for the tax years 1917 to 1927, inclusive, and deponent believes that all of said taxes have been paid with the possible exception of the taxes set forth in the claim for $1,372.37. The State is now attempting to recompute and redetermine the franchise taxes. For fourteen years (since 1917) the State could have taken steps to determine if its original computation of tax was incorrect. Instead of doing that while the bankrupt corporation was doing business and was solvent, the State took its one and only step after bankruptcy and after the books of the bankrupt had been sold by order of the Court. The State had notice of the proposed sale. It filed a claim on March 29th, 1929; the sale was approved at a creditors' meeting on April 10, 1929. If the State had been diligent it could have appeared at the creditors' meeting and objected to the sale of the books or it could have insisted that the right of inspection of the books be reserved under the contract of sale. It failed to take any of these steps.

The presence of said "Notices of Unliquidated Claim" in the files of this proceeding prevents the Trustee from administering the estate and distributing the money in its possession. The Trustee has refrained for one year and [fol. 28] four months from taking any action to strike said notices from the files herein. During all of said period of time it has been compelled to keep a cash reserve of approximately $40,000, which otherwise would have been distributed herein. So long as said notices are permitted to remain as part of the record in this matter the Trustee cannot dispose of said fund or close the estate. The Referee cannot allow the claim if any, of the State of New York for no claim has been presented and for the same reason he cannot disallow it.

Said "Notices of Unliquidated Claim" do not comply with the Bankruptcy Act in any way. There is no provision in the act permitting the filing of such a paper, nor is

the filing in accordance with the practice in bankruptcy proceedings. The filing of claims is governed by the provisions of Section 57 of the Bankruptcy Act which reads as follows:

"Section 57. Proof and Allowance of Claims.—a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The act makes no provision for filing of notices of claim. It is very explicit in providing for the filing of proofs of [fol. 29] claim only. The filing of the notice was in no way a compliance with the act and it is therefore a nullity. The trustee should not be compelled to delay the closing of a bankrupt estate by proceedings taken by a creditor not in accordance with the Bankruptcy Act.

By its own notice the State of New York has now attempted to collect additional franchise taxes for the tax years beginning November 1, 1917 to 1928. In other words, the State of New York is now delaying the closing of this estate because of its inability to compute correctly the franchise taxes due it for the tax years beginning November 1, 1917 to 1928. It has already imposed franchise taxes for the years 1917 to 1927, inclusive, and it is now attempting to force the Trustee to re-audit the accounts and books of the bankrupt for the ten years preceding the bankruptcy so that the State can determine if there is any further tax due it. It is quite evident that we have here nothing more or less than a fishing excursion. The State having no positive knowledge that any additional franchise taxes are due has put in a notice of an unliquidated claim which it has failed to follow up by formal proof, has demanded that the Trustee supply it with audits for the years 1917 to 1928 so that it may compute the additional franchise taxes due, if any, and because of its inability by itself to determine if any additional franchise taxes are due it is delaying the [fol. 30] closing of this estate and preventing the distribution of the money which the Trustee is forced to hold as a reserve until this matter is finally determined.

Wherefore your deponent prays for an order striking from the Referee's file herein the aforementioned two certain notices each entitled "Notice of Unliquidated Claim of the State of New York for Taxes", dated March 29, 1929, and October 17, 1929, respectively, and cancelling and expunging said notices and directing the Trustee herein to disregard said notices or any claims filed in support thereof and for such other, further or different relief as the Court may deem just and proper.

Robert L. Smith.

Sworn to before me this 30th day of March, 1931. Robert Halpern, Commissioner of Deeds, N. Y. City. Kings Co. Cl'k's No. 50, Reg. No. 1047. N. Y. Co. Clk's No. 151, Reg. No. 56H1. Commission expires June 11, 1931.

(The exhibits attached to this affidavit are as heretofore printed.)

[fol. 31] In United States District Court, Southern District of New York

In Bankruptcy

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Statement of Evidence

Before Hon. Peter B. Olney, Jr., Referee

New York, April 9, 1931—3:30 o'clock, P. M.

Hearing on Motion to Expunge Notices of Claims of State of New York

Appearance

S. John Block, Esq., Attorney for the Trustee.
John J. Bennett, Esq., Attorney General, Represented by Mr. Anthony P. Ludden, Deputy.

The Referee: What is this all about?

Mr. Block: A long time has elapsed since the bar order was made and filed in this matter.

The Referee: When was the bar order entered?

Mr. Block: July 18, 1929.

The Referee: When was the expiration date?

Mr. Block: September 18, 1929.

The Referee: Is that conceded?

Mr. Ludden: Yes, sir, that is conceded.

[fol. 32] Mr. Block: And nothing has been done by the State.

The Referee: The State filed this notice when, the notice that you have moved to expunge?

Mr. Block: One March 29, 1929, and one October 17, 1929, which was filed after the bar order itself had been served and that was merely another notice.

The Referee: What has the State to say why I should not follow the decision of Referee McDonald upon the conceded facts before me?

Mr. Ludden: In the first place the State of New York claims that property of the bankrupt is taken over by the Trustee and when taken over by the Trustee was subject to a definite lien for taxes.

The Referee: What taxes?

Mr. Ludden: For the years 1917 to 1928 inclusive.

The Referee: Taxes for those years have been paid, haven't they?

Mr. Ludden: Partly, but they are never paid unless the amounts are correctly paid.

The Referee: Have not all the taxes imposed by the State in these years been paid?

Mr. Ludden: The State accepted, of course, the return of the corporation as made to them but under our tax law the State of New York, Section 219-d, upon the change of the rate or the amount by the United States Government, it is the duty of the taxpayer or the corporation to make a further return to the State of New York to conform to the [fol. 33] figures as fixed by the United States Government, and as far as the State of New York is concerned, we claim the taxes have not been paid until the entire amount, cor-

rected amount has been paid, and that the lien remains in force until that time.

The Referee: Is it conceded the amount of the net income for any year for this corporation as returned to the United States Treasury Department was changed or corrected by the Commissioner of Internal Revenue?

Mr. Ludden: I am informed so by the Tax Department of the State of New York.

The Referee: What do you contend to be the facts in that connection?

Mr. Hutchins: This matter has been pending, as far as we are concerned, for some time, since the filing of the notice of unliquidated claim for these additional taxes and since that time I have received from attorneys familiar with this matter copies of determinations of the United States Government. I also inspected the file of claims filed in this proceeding and found the Federal Government had filed claims for additional taxes covering the calendar years 1922, 1924, 1925 and 1926, I believe. In any event for certain years claims have been filed by the Federal Government and no report of this was made by the bankrupt to the State Tax Department.

The Referee: Then why didn't you file a claim in time based on those claims filed here by the United States Government?

Mr. Hutchins: I felt in view of the provisions of our tax law and in view of the fact the taxpayers are required to [fol. 34] report to us the changes and the regulations of the State Tax Department require the actual Federal audit shall be reported to the Tax Department, and in view of the fact also that the purchasing company had delivered to it all of the books, records and other data belonging to the bankrupt, that upon a request coming from our Department that there should be no difficulty or objection in their furnishing that information. The tax law also permits the taxpayer who submits such determinations to concede the final Government figures as correct or point out wherein they are erroneous and we understand there was some attempt being made to compromise the Government claim.

Mr. Ludden: I might also say the Court of Appeals of the State of New York has held that where a return has been made by the taxpayer or a tax fixed, notwithstanding

the fact the return has not been filed and the amount has not been fixed, it still is a lien on the property.

The Referee: What case is that?

Mr. Ludden: The Minor C. Keith, Inc. case, 250 N. Y., 216. The State of New York states they received no notice of the payment of dividends, no notice of the sale of the property and no notice other than the bar order?

Mr. Block: I will not concede that. You knew of the bankruptcy proceeding because you filed a claim within the six months' period.

Mr. Ludden: We did not get any notice with respect to the sale or its terms and we got no notice as to payment of dividends.

[fol. 35] The Referee: Is there anything else to be put on record?

Mr. Block: There have been dividends paid in this matter totaling eighty-five percent of the face amount of the claims filed and allowed. I offer in evidence as part of the record the agreement and supplemental agreement between the trustee and the Experimenter Publication Inc. and Mr. McKinnon, and the order of the court approving that agreement and whatever papers there are on file in the matter of the sale to the above named persons and also the sale of the radio station. Also the orders of the court with reference to those sales and also the order of the court made during September, 1929, setting forth a list of all claims filed and allowed and a list of claims filed and disputed and the several orders of the court declaring dividends in this matter and directing the payment of dividends by the trustee.

Mr. Ludden: I do not think that is relevant to the New York State claim. If I have to appeal, I do not want to print all those papers.

The Referee: Why don't you put it into a stipulation of facts?

Mr. Ludden: I would like to ask an opportunity to file our claims and the trustee if possible give us a copy of the claims of the United States Government.

The Referee: Why don't you furnish Mr. Ludden with such information as he asks without prejudice to the decision on this motion?

Mr. Block: I have no information to furnish him with.

[fol. 36] The Referee: All right, the matter is adjourned sine die so that either party may put in anything further they wish to, the understanding now being that the parties will attempt to get up a state of facts.

Mr. Block: I would like to have it adjourned for a definite date.

The Referee: All right, then I would suggest about two weeks.

Mr. Block: All right, sir.

Minutes of June 17, 1931

Re Experimenter Publishing Co., Inc., Bankrupt

Before Hon. Peter B. Olney, Jr., Referee

New York, June 17, 1931—12:30 p. m.

Adjourned hearing on motion against State of New York.
Present: The Referee, Mr. Block.

The Referee: The default of the State of New York is noted.

Mr. Block: Of course they have been present at other hearings and presented their side of the case.

[fol. 37] The Referee: It is made a part of the motion papers and it is also conceded that bar orders against the State of New York were duly filed and that these so-called notices of unliquidated claims by the State of New York were filed with the Referee subsequent to the expiration of the term limited in the bar orders. Is that correct?

Mr. Block: Yes, sir. That is the substance of it.

The Referee: On the authority of the Matter of Mutual Parlor Suite Co., 11 A. B. R., N. S. 116, decided by Referee McDonald in Brooklyn, deciding that a bar order means what it says and that, therefore, the State of New York and the Government are barred from filing a claim. That matter was confirmed upon review by Judge Inch, United States District Court, Eastern District of New York, on December 16, 1927, and I shall grant this motion *in toto*.

Mr. Block: I would like to have it noted that at one of the prior hearings the State Tax Department was repre-

sented by an Assistant Attorney General of the State and conceded all of the matters of fact set forth in the moving affidavit of Robert L. Davis were true and correct.

The Referee: You may enter an order.

Hearing closed.

[fol. 38] Minutes of June 24, 1931

Re Experimenter Pub. Co., Inc., Bankrupt

Before Hon. Peter B. Olney, Jr., Referee

New York, June 24, 1931—2 o'clock p. m.

Reopened hearing on motion against State of New York.

Present: The Referee, Mr. Halpern, Mr. Ludden, Mr. Hutchins.

Mr. Ludden: I ask to open the default taken against the State of New York on June 17, 1931, and I desire to present certain facts.

The Referee: I will grant the motion and we will proceed at once.

Charles W. Hutchins, a witness called in behalf of the State of New York, having been first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Ludden:

Q. Where do you live?

A. 49 Lincoln street, New Rochelle.

[fol. 39] Q. What is your occupation?

A. Corporation tax examiner of bankrupts, department of taxation and finance.

The Referee: Now the Referee stated on June 17th that the notices of unliquidated claims of the State of New York were filed with the Referee subsequent to the expiration of the time of the bar orders. This is not strictly correct, the expiration date in the bar order which was served on July 18, 1929, specified sixty days, which expired September

16, 1929. As a matter of fact and as stated in the motion papers one of these notices of unliquidated claims, of which there was a series, was filed on March 25, 1929, at the same time that there was filed a claim for unpaid franchise taxes.

Mr. Halpern: We object to the taking of any further testimony at this time.

The Referee: Overruled. You may have an exception.

Q. Mr. Hutchins, you are an employee of the State Tax Commission of the State of New York?

A. I am, sir.

Q. And have you had charge of the investigation of the Experimenter Publishing Co., Inc., in bankruptcy?

A. Yes, sir.

Q. With respect to fixing the corporate franchise taxes due to the State of New York?

A. I have.

Q. Have you made efforts to obtain information and figures on which to base an account definite in order to file [fol. 40] same with the referee in bankruptcy?

Mr. Halpern: I object to that as incompetent, irrelevant and immaterial because attempts to get the figures are immaterial; it is wholly a question of whether the proofs of claim have been filed in time and anything done after the expiration of the sixty day bar order is immaterial.

The Referee: I will take the testimony.

A. Yes.

Q. Please state as briefly as possible what those efforts consisted of?

A. At the time of the filing of the notice of unliquidated claim—

By the Referee:

Q. Which one?

A. The notice of unliquidated claim of October 18, 1929.

Q. How about the one of March 28, 1929, what did you do then?

A. My recollection is that late in the summer of that year——

By Mr. Ludden:

Q. What year?

A. 1929.

By the Referee:

Q. How much later?

A. Before the expiration of the bar order and shortly before leaving on my annual vacation I learned that the Federal Government had filed claims for additional taxes levied against the bankrupt and became aware of the fact that there had been a sale of the assets, including the books of the bankrupt, and my best recollection is that I took up [fol. 41] through personal visitation with the attorneys for the successor company the necessity of submission to us of the final determinations of any levies made by the United States Treasury Department.

Q. Did you say you ascertained a proof of debt in bankruptcy by the Federal Government had been filed with the Referee?

A. Yes. Upon my return in October——

Q. How long were you away?

A. As I recall it my vacation was split that year. I took two weeks and then two weeks later, in September. I will say that we had several conferences at our office with representatives of Wise, Whitney & Parker regarding this situation. However on October 18th notice of unliquidated claim was prepared and filed and accompanied by a letter addressed to the Referee in Bankruptcy and a copy of that,—on the same day a letter was also written to the Irving Trust Company, enclosing a copy of the letter to the Referee, together with copy of the notice of unliquidated claim and also enclosing blank forms for the year 1928, for which year the bankrupt had not filed a report for the purpose of fixing the taxes for the year beginning November 1, 1928.

Q. Why didn't you do all that before the time had expired?

A. If this had been the only case I was working on at the time I probably would have. I had many other cases pending at the time.

Q. All right, go ahead.

A. Notice of unliquidated claim which had been filed in March, 1929, prior to the expiration of the bar order. The [fol. 42] letters written on October 18th addressed to the Irving Trust Company and to Wise, Whitney & Parker referred to the necessity of submission——

By Mr. Ludden:

Q. If you have them there produce them and I will offer them in evidence.

A. All right, I have here copies of the letters to the Irving Trust Company and Wise, Whitney & Parker.

Mr. Ludden: I offer these two letters in evidence as one exhibit.

Mr. Halpern: I object to them, they are not the originals.

The Referee: Overruled.

Mr. Halpern: Exception.

(Letters referred to received in evidence and marked, "State Government's Exhibit 1, June 24, 1931.")

Q. Continue.

A. On October 22, 1929, the Irving Trust Company acknowledged receipt of our letter of the 18th of October, stating same had been referred to their attorneys for their immediate attention. On November 29, 1929, having no reply from Wise, Whitney & Parker, a follow up letter was written to them and on the same date a letter was written to the Irving Trust Company, calling attention to the fact that other than their acknowledgment of our letter of October 18th, we had heard nothing further in the matter.

Mr. Ludden: I offer copy of this letter in evidence.

[fol. 43] Mr. Halpern: I make the same objection.

Referee: Overruled.

Mr. Halpern: Exception.

(Paper referred to received in evidence and marked, "State Government's Exhibit 2, June 4, 1931.")

Q. Continue.

A. On December 3, 1929, in response to our letter of November 26th, Wise, Whitney & Parker wrote our department a letter indicating thus far unsuccessful efforts to obtain the information required.

Mr. Ludden: Copy of which letter is offered in evidence.

Mr. Halpern: I make the same objection.

The Referee: Overruled.

Mr. Halpern: Exception.

(Paper referred to received in evidence and marked, "State Government's Exhibit 3, June 24, 1931.")

Q. Continue.

A. On January 28, 1930, our office received a letter from Mr. Block, attorney for the trustee, replying to our office letter of November 6, 1929, addressed to the Irving Trust Company.

Mr. Ludden: I offer this letter in evidence.
Mr. Halpern: Same objection.
The Referee: Overruled.
Mr. Halpern: Exception.

(Received in evidence and marked, "State Government's Exhibit 4, June 24, 1931.")

[fol. 44] Q. Continue.

A. On February 14, 1930, Mr. Block's letter of January 28th was replied to.

Mr. Ludden: Copy of which letter is offered in evidence.
Mr. Halpern: I make the same objection.
The Referee: Overruled.
Mr. Halpern: Exception.

(Received in evidence and marked, "State Government's Exhibit 5, June 24, 1931.")

Q. Continue.

A. Under date of February 19, 1930, following a conference which I had had at the office of Epstein & Brothers, with Mr. Brothers, attorneys for the successor company, a letter was written by Epstein & Brothers addressed to me indicating further efforts were being taken to get the figures necessary for final determination.

Mr. Ludden: I offer this letter in evidence.
Mr. Halpern: The same objection.
The Referee: Overruled.
Mr. Halpern: Exception.

(Paper referred to received in evidence and marked, "State Government's Exhibit 6, June 24, 1931.")

Q. Continue.

A. On March 14, 1930, a letter was written to our department by P. D. Diffenderfer, secretary of the successor company, with respect to supply certain data required to be submitted to the United States Government Revenue office in order that the photostats might be obtained.

[fol. 45] Mr. Ludden: I offer this letter in evidence.

Mr. Halpern: I make the same objection and I ask your Honor that I have a continuing objection and exception to all these offers.

The Referee: Very well.

(Received in evidence and marked, "State Government's Exhibit 7, June 24, 1931.")

Q. Continue.

A. Likewise copy of letter from Mr. Diffenderfer to Mr. Brothers instructing him to make these efforts.

Mr. Ludden: Copy of which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 8, June 24, 1931.")

Q. Continue.

A. On March 25, 1930, Mr. Block forwarded a letter to us referring to our letter dated February 14, 1930, stating he would arrange for another meeting to discuss the law.

Mr. Ludden: I offer this letter in evidence.

(Paper referred to received in evidence and marked, "State Government's Exhibit 9, June 24, 1931.")

Q. Continue.

A. On October 15, 1930, a letter was written by our office addressed to Mr. Diffenderfer.

Mr. Ludden: Copy of which letter is offered in evidence.

(Received in evidence and marked, "State Government's [fol. 46] Exhibit 10, June 24, 1931.")

Q. Continue.

A. On April 10, 1931, after the notice of motion was served, I took the matter up in person with Mr. Diffenderfer and confirmed his statement to me that he would attempt to facilitate matters. He wrote a letter addressed to me dated April 10, 1931.

Mr. Ludden: Which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 11, June 24, 1931.")

Q. Continue.

A. Likewise a similar letter dated May 12, 1931. This last correspondence indicates that this information we are seeking should be at hand within a comparatively short time.

Mr. Ludden: Which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 12, June 24, 1931.")

Q. Continue.

A. Also copy of letter of June 4, 1931, written by Mr. Diffenderfer to the Commissioner of Internal Revenue, Washington, D. C., stating that they were inclosing affidavits in connection with the Experimenter Publishing Co. Inc.

Mr. Ludden: Copy of which letter is offered in evidence.

(Received in evidence and marked, "State Government's Exhibit 13, June 24, 1931.")

[fol. 47] Q. Now Mr. Hutchins, you have not received information which would enable you to make a definite and proper claim to file as proof here before the Referee as yet, have you?

A. No.

Q. When do you think you will be able to file proper proofs of claim here in this proceeding?

Mr. Halpern: That is objected to.

The Referee: He may answer. Of course that depends on when he will get the information from Washington, that is obvious.

Q. If you do not know say so?

A. I do not know.

Q. Do you think it will be within a year?

A. Some time before the determination of this proceeding.

Mr. Ludden: Will you stipulate there have been objections filed to our claim that has been filed and that they have not been brought on for hearing?

Mr. Halpern: That is conceded.

Mr. Ludden: And the distribution of the estate has not been completed?

Mr. Halpern: That is conceded.

Mr. Ludden: How much is there in the estate at the present time?

The Referee: The present balance in the hands of the trustee is $50,539.06.

By the Referee:

Q. Now will you tell me this, please. One of your taxes is this 1928 tax, as to which under the laws of the State of New York it was the duty of the Experimenter Publishing [fol. 48] Co., Inc. to have filed a return in June or July, 1929, is that correct?

A. A report for the 1928 tax was due July 1, 1928, but was not filed.

Q. That was long prior to the bankruptcy?

A. Yes, sir.

Q. You are not claiming any tax for 1929?

A. No, by reason of the fact the 1929 tax, the tax for the year beginning November 1, 1929, accrued subsequent to the time of the bankruptcy.

Q. And the tax you are claiming for is for the tax for the year 1928, which became due in November, 1928, and as to which a report should have been filed July 1, 1928?

A. That is right, sir.

Q. And no such report was filed?

A. No, sir.

Q. What remedies do the statutes of the State of New York give to the State of New York to compel the filing of such a report where it has not been done?

A. It places a penalty upon the corporation for failure to file the report.

Q. What is that penalty?

A. Not less than $5,000.

Q. Did you take any steps to enforce that penalty against the corporation before this bankruptcy?

A. No, we did not.

Q. Now, these additional franchise taxes for the years beginning November 1, 1917, and running to 1928 inclusive, that is based upon what?

A. Information obtained by me.

Q. What is it based on, the tax?

A. On amounts of net incomes over and above the amount of net income as finally determined by the United States Treasury Department.

[fol. 49] Q. How did you find out the treasury department had made any other determination?

A. Through information obtained in the bankruptcy proceedings.

Q. When was that and what did you find?

A. That the Federal Government had filed claims for two or three years.

Q. When did you examine these files, before you went away on your vacation or after?

A. I believe before I went away.

Q. Have you no way, except the method you took, of obtaining the information from Washington direct as to what their assessment was?

A. So far as I know we have none.

Q. Do you contend, Mr. Hutchins, that when you discovered the Government had filed a claim for taxes in August, 1929, that there was nothing you could do outside of what you did do by way of examination in Washington to discover what this additional tax assessment was?

A. That is correct up to the time when the changes become definitely fixed as to amount and final determination. I do not believe there is any additional tax due before that time. We were told by Mr. Block and we have been led to believe early in this matter that appeals were pending in Washington on objections prior to the bankruptcy made by the bankrupt.

Q. Yes, but the Government filed a claim in August, 1930. Now, do you mean to say that the sources of information that the Government had were sealed to the State of New York, so that you could not get that information?

A. So I understand.

[fol. 50] Q. Did you ever attempt to get such information from Washington?

A. No, not directly.

Q. So you do not know absolutely of your own knowledge that it is impossible to get it?

A. No.

Q. You state, however, that your understanding of the Federal regulations is that they would prevent you from getting it?

A. Yes, sir. May I make one correction?

Q. Yes.

A. I believe my first information as to these changes, this additional tax liability due to the United States Government arose through statements contained in Schedules of liabilities filed in the United States District Court. I then came over and found the Federal Government filed a claim here.

Q. All this information you discovered prior to September 16, 1929, didn't you, or some of it anyway?

A. Yes, sir. May I add further the schedules of liabilities were filed with respect to any tax liabilities to the State of New York and there were filed by the attorneys for the petitioning creditors and the attorney for the trustee, their names appearing on the back of the schedules.

Cross-examination.

By Mr. Halpern:

Q. Have you made any attempt to bring on for hearing any of the claims you filed in this proceeding?

A. No.

Q. If you had brought them on for hearing and you had issued a subpœna duces tecum to the Experimenter Publishing Company, Inc., requiring them to bring into this [fol. 51] court—that is to the Experimenter Publications, Inc., the successor company, requiring them to bring into this court for your examination all the books of the bankrupt that they had bought at the sale in 1929, you would have had access to these books?

Mr. Ludden: I object to that as incompetent.

The Referee: Sustained.

Q. You stated that you learned in the early part of 1929 or prior to your going on vacation that the sale of the assets including the books of the corporation, had taken place?

A. Yes.

Q. And knowing that you wrote to the Irving Trust Company on October 18th and requested them to fill out form 3-I. T and other forms for the purpose of enabling you to compute the taxes even though you knew the books had already been sold?

A. I did not request them to fill it out, I enclosed the blanks and called their attention to the necessity of having the information filed.

Q. You have taken no other legal steps to force the corporation to bring in the books of the bankrupt so you could examine them, have you?

A. No.

Q. You say that your interpretation of the New York State tax statute is that no additional tax is due until the United States Government claim for taxes — finally determined?

Mr. Ludden: I object to that as incompetent, irrelevant, and immaterial.

The Referee: He may answer.

Mr. Ludden: Exception.

A. Until the matter is finally determined.

[fol. 52] Q. Then if the claim of the United States Government for approximately $31,000 should be disallowed or reduced for any reason, you would not have a claim for taxes until that determination in this proceeding?

A. This is correct.

Q. Therefore, you do not know how soon you will have any claim for taxes or whether you will have any at all?

A. We know we have liabilities for taxes in some amount, a potential liability at least.

Q. Then as to the other ones for the year 1917 to 1928 additional taxes, if the Federal Government's claim is disallowed you have no claim for taxes?

A. Correct.

Q. And until that is finally determined you cannot state positively whether you have or have not a claim for any amount?

A. Unless the matter has been finally determined by a competent authority, if it has been settled by the Board of Tax Appeals and no review is taken, we will be in a position to file a claim. We do not know if the matter will be terminated in this proceeding or compromised or what will happen. We would like to know that.

Q. Have you made any search of the records of the Board of Tax Appeals?

A. Not as yet. I do not know if we can get that information or not.

Q. It is a court of record, is it not?
A. I am not familiar with it. I am about to look into it.

Mr. Ludden: I move the motion to expunge this unliq-
[fol. 53] uidated claim of the State of New York and the order to bar any proof in support thereof be dismissed by reason of the fact the estate has not been distributed as yet and there are sufficient funds to pay it and further the claim of the United States Government has not been heard as yet and there will be no delay in the administration of this estate by reason of the claims of the State of New York.
The Referee: I will take it under advisement.

By the Referee:

Q. Are those what you call the schedules that you examined and first discovered there was a Government claim?
A. Yes.

The Referee: Mark these schedules in evidence as my exhibit.

(Schedules referred to received in evidence and marked, "Referee's Exhibit 1, June 24, 1931.")

Hearing closed.

[fol. 54] Claimant's Exhibit 1—Letter from State Tax Department to Wise, Whitney & Parker, Dated October 18, 1929

Copy

State Tax Department, Corporation Bureau

C. W. Hutchins

Oct. 18, 1929.

Wise, Whitney & Parker, 11 William St., New York City.

Att. Mr. Wise. Re Experimenter Publishing Co., Inc., Bankrupt, #46582

Gentlemen: For your information enclosed find copy of letter forwarded this day to Referee Olney, also copy of let-

ter forwarded this day to Irving Trust Company, Trustee In Bankruptcy.

You will note the necessity of the submission *of* this Department of final determinations as made by the U. S. Treasury Department on corporate net income of the Bankrupt for any and all years from 1916 to 1928 inclusive, also of the necessity of filing a franchise tax return due July 1st, 1928.

[fol. 55] Kindly acknowledge receipt of this letter, and advise as to possibility of an early adjustment of these matters.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CWH:CA.
Encl.

CLAIMANT'S EXHIBIT 1—LETTER FROM STATE TAX DEPARTMENT TO IRVING TRUST CO., DATED OCT. 18, 1929

Copy.

State Tax Department, Corporation Bureau
C. W. Hutchins

Oct. 18, 1929.

Irving Trust Co., 233 Bway., New York City.

Re Experimenter Publishing Co., Inc., Bankrupt, #46582

GENTLEMEN: Enclosed find copy of letter forwarded this day to Referee Olney, together with copy of notice of unliquidated claim for unpaid franchise taxes. There is also enclosed blank Form 3IT due July 1st, 1928 for which [fol. 56] year the bankrupt above mentioned is delinquent.

In addition to the filing of the above mentioned return, it will also be necessary that there be submitted to this office all final determinations of the U. S. Treasury Department, effecting net income of this Corporation for the years 1916 to 1927 inclusive.

This matter has heretofore been discussed with Mr. Garrison as well as Mr. Wise, who we understand represents the purchaser of certain of the assets of the bankrupt in this proceeding.

Will you kindly acknowledge receipt of this letter at an early date, and notify this office as to your position in reference to the position taken by this Department in its letter to Referee Olney.

A copy of the letter forwarded to Referee Olney has also been furnished Mr. Wise.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CWH:CA.
Encl.

[fol. 57] CLAIMANT'S EXHIBIT 2—LETTER TO IRVING TRUST CO., DATED NOV. 26, 1929

State Gov. Ex. 2, 6/24/31

Copy

State Tax Department, Corporation Bureau

C. W. Hutchins

Nov. 26, 1929.

Irving Trust Co., 233 Bway., New York City.

Re Experimenter Publishing Co., Inc., Bankrupt, #46582

GENTLEMEN: This office wishes to call your attention to letter of Oct. 18th, 1929 and your reply thereto, of Oct. 22nd, 1929, wherein your advised that Department's letter with enclosures had been referred to your Attorneys for their immediate attention.

This office has received no further communication in this matter, and wishes to be advised at once, as to your intention with relation to Department's request for the filing at this office, of report Form 3IT due July 1st, 1928, and the submission of certain final determinations of the U. S. Treasury Department, affecting the net income of this Corporation, for the years 1916 to 1927 inclusive.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CWH:CA.

[fol. 58] CLAIMANT'S EXHIBIT 3—LETTER FROM WISE, WHITNEY & PARKER, DATED DEC. 3, 1929

State Gov. Ex. 3, 6/24/31

Wise, Whitney & Parker, Counselors-at-Law, 15 William Street, New York

December 3, 1929.

Department of Taxation & Finance, 220 West 40th Street, New York City.

Attention of Mr. Bates. Re Experimenter Publishing Co., Inc., Bankrupt, 46582

GENTLEMEN: We have your letter of November 26th asking for reply to your letter of October 18th. Since the writer saw you at the Department in September, we have been endeavoring to procure the information required by the Department, but without success. The files of the bankrupt turned over to our client, Experimenter Publications, Inc., do not include copies of the income tax returns filed with the United States, nor of any adjustments of these taxes with the Government.

We have been endeavoring to obtain such copies from the Department in Washington with the assistance of the at-[fol. 59] torney for the trustees. Until we have these, we are powerless to assist in this connection.

Very truly yours, Wise, Whitney & Parker.

D5. State Tax Dept. Received Dec. 3, 1929. Corporation Bureau, New York Office.

[fol. 60] CLAIMANT'S EXHIBIT 4—LETTER FROM S. JOHN BLOCK, DATED JANUARY 21, 1930

State Gov. Ex. 4, 6/24/31

Law Offices of S. John Block, 225 Broadway, New York

Telephone: Barclay 6171

January 21, 1930.

State of New York, Department of Taxation and Finance, State Tax Commission, 220 West 40th Street, New York, N. Y.

Re Experimenter Publishing Company, Inc., Bankrupt.
Attention of Mr. C. W. Hutchins, #46582

GENTLEMEN: Your letter of November 6, 1929, addressed to Irving Trust Company has been referred to me for my attention.

All the books of the bankrupt have been sold to, and are now in the possession of, Experimenter Publications, Inc., the purchaser of practically all of the assets of the bankrupt. The books are entirely out of the control of the Trustee. The Trustee is, therefore, not in a position where it can prepare and file your report Form 31T, due July 1, 1928.

Upon the legal aspect of this matter, I am of the opinion that the State is not entitled to file any claim for taxes as [fol. 61] it is barred by the order of Referee Olney, a copy of which order was duly served upon your department and upon the attorney for the State Tax Commission. The obligation to pay the tax having accrued prior to the bankruptcy, the State is barred not only by the bar order but also by the six months' statute of limitation provided in Section 57 of the Bankruptcy Act. The cases interpreting that section hold that claims of State Governments which have accrued prior to the bankruptcy are subject to the provisions of the section as are the claims of any other creditor. Do you not accept this version of the law?

With regard to your request for the submission of certain final determinations of the United States Treasury Department affecting the net income of this corporation for the years 1916 to 1927, inclusive, allow me to inform you that the claim of the United States Government, based upon these determinations, is now being contested and until the objections to the claim are finally determined the Trustee will be unable to furnish you with the information requested.

I trust that the foregoing statement will be satisfactory to you.

Very truly yours, S. John Block.

SJB/MP.

[fol. 62] State Tax Dept., Received Jan. 22, 1930. Corporation Bureau, New York Office.

CLAIMANT'S EXHIBIT 5—LETTER FROM STATE TAX DEPARTMENT TO S. JOHN BLOCK, DATED FEB. 14, 1930

State Gov. Ex. 5, 6/24/31

Copy

State Tax Department, Corporation Bureau

C. W. Hutchins

Feb. 14, 1930.

Mr. S. John Block, 225 Bway., New York City.

Re Experimenter Publishing Co., Inc.

DEAR SIR: Replying to your letter of Jan. 21st, you are advised that so far as the dictator is aware, the provisions of Section 57 of the Bankruptcy Act are not applicable to or binding upon the Sovereign.

It is our further understanding that the purpose of bar orders relative to taxes due the State, is to permit distribution with safety from personal liability and not to evade [fol. 63] or avoid such statutory obligations for the support of the Government of the State of New York.

The Department served notice in this bankruptcy proceeding of unpaid franchise tax, for the tax year beginning Nov. 1st, 1928 by filing in the office of the Referee in Bankruptcy, a so-called notice of unliquidated claim, same having been filed on or about March 29, 1929; likewise similar notice was given in the matter of Consrad Co. Inc., under date of June 11th, 1929 covering the tax years beginning Nov. 1st, 1920, 1921, 1923, 1924, 1925 and 1928.

As to the precise nature of the liability for taxes assessed under the provisions of Article 9-A of the Tax Law, you are respectfully referred to the following decisions of the Court of Appeals of this State.

"Engelhardt vs. Alvino Realty Company, Inc., 248 N. Y. 374."

"Helen V. Carey vs. Minor C. Keith, Inc., 250 N. Y. 216."

Referring to the next to the last paragraph of your letter, Department wishes to be informed as to the present status of the situation with respect to the contesting of these additional claims for taxes. Have proceedings been

taken under the provisions of the Income Tax Law or under the provisions of Section 64-A of the Bankruptcy Act?

[fol. 64] There would seem to be no reason why at this time information should not be submitted as to the determinations of the Federal Government, for if same are revised, an adjustment would be due the taxpayer under Section 219-D of the Tax Law.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CA.

CLAIMANT'S EXHIBIT 6—LETTER FROM EPSTEIN & BROS., DATED FEB. 19, 1930

Epstein & Brothers, Attorneys-at-law, 2 Rector Street

New York, February 19th, 1930.

Mr. Charles W. Hutchins, c/o State Tax Department, 220 West 40th Street, New York City.

DEAR MR. HUTCHINS: I am this day writing to Messrs. Olvany, Eisner & Donnelly instructing them to furnish you with such information as you may require regarding the tax claims made by the U. S. Government against the Experimenter Publishing Co., Inc. If you will phone Mr. Berliner of that office, I am certain that Mr. Berlinger will make an appointment with you for the foregoing purpose.

Very truly yours, Arthur J. Brothers.

AJB:M.

[fol. 65] CLAIMANT'S EXHIBIT 7—LETTER FROM MACKINNON-FLY PUBLICATIONS, DATED MARCH 14, 1930

Mackinnon-Fly Publications, Inc., Experimenter Publications, Inc., Novel Magazine Corporation, 381 Fourth Ave., New York

Bogardus 0900

March 14th, 1930.

State Tax Commission, 220 West 40th Street, New York, N. Y.

Attention Mr. Hutchinson

GENTLEMEN: In compliance with your request, I have written to our attorney, Mr. Arthur Brothers, of Epstein

& Brothers, #2 Rector Street, New York, requesting that he get us an affidavit from the Irving Trust Company, Trustee, for the purpose of our securing photostatic copies of the Federal Returns filed by the Experimenter Publishing Company for the years 1925, 1926 and 1927. Just as soon as Mr. Brothers secures the necessary implements to use in securing such copies, I will immediately forward our check to Washington to secure such copies.

In the meantime, if you desire any further information and I can be of any further assistance, please do not hesitate to call on me. Also, I am sure that Mr. Brothers [fol. 66] will be glad to do anything in his power to help you.

Yours very truly, P. B. Diffenderfer, Secretary.

P. B. Diffenderfer.
FC.

State Tax Dept. Received Mar. 17, 1930. Corporation Bureau, New York Office.

CLAIMANT'S EXHIBIT 8—LETTER FROM STATE TAX DEPARTMENT TO ARTHUR BROTHERS, DATED MARCH 14, 1930

March 14th, 1930.

Mr. Arthur Brothers, Epstein & Brothers, #2 Rector Street, New York, N. Y.

DEAR MR. BROTHERS: Mr. Hutchinson of the State Tax Department visited with me yesterday and tried to get information on the Federal Returns, as prepared by the Experimenter Publishing Company, for the years 1925, 1926 and 1927.

[fol. 67] I turned over to Mr. Hutchinson all available information which we had in our files and as you understand, nothing was brought to light which would be of material assistance to Mr. Hutchinson. Thereupon, Mr. Hutchinson suggested that I try to obtain photostatic copies of these returns. I told Mr. Hutchinson that I could not do this unless an affidavit to the effect that we had a right to such returns was obtained from the Irving Trust Company, trustee in bankruptcy, for the Experimenter

Publishing Company, for the purpose of obtaining such copies—same to be forwarded to Washington.

Therefore, will you please get the necessary implements from the Irving Trust Company in order that I can secure such photostatic copies of returns, as requested.

Yours very truly, P. B. D., Secretary.

P. B. Diffenderfer.
FC.

[fol. 68] CLAIMANT'S EXHIBIT 9—LETTER FROM S. JOHN BLOCK, DATED MARCH 25, 1930

Law Offices of S. John Block, 225 Broadway, New York
Telephone: Barclay 6171

March 25, 1930.

Corporation Tax Bureau, Department of Taxation and Finance, State of New York, 220 West 40th Street, New York, N. Y.

Attention of Mr. C. W. Hutchins. Re Experimenter Publishing Company, Inc., Bankrupt

GENTLEMEN: I am giving my attention to your letter in the above matter dated February 14, 1930. As soon as I shall have prepared a summary of the law which I feel will meet the arguments cited in your letter I shall communicate with you and arrange for another meeting to discuss the law pertaining to the claim of the State of New York.

Very truly yours, S. John Block, by R. H.

RH/MP.
Dictated by Mr. Halpern.

[fol. 69] CLAIMANT'S EXHIBIT 10—LETTER FROM STATE TAX DEPT. TO P. B. DIFFENDERFER

Copy

Department of Taxation and Finance, Corporation Tax Bureau
C. W. Hutchins

Oct. 15, 1930.

Mr. P. B. Diffenderfer, 381 4th Ave., New York City.

Re Experimenter Publishing Co., Inc.; also the Consrad Co. Inc. Bkpt., #46582, #46613

DEAR SIR: This office has not heard further from you since your letter of March 14th, 1930 wherein you advised that through your Attorneys, certain steps had been taken to obtain photostatic copies of Federal Returns, filed by the Experimenter Publishing Co. Inc. for the years 1925, 1926 and 1927.

Kindly advise the present status of this matter by return mail, as this Department has received a letter from the Department of Law, suggesting expedition in the settlement of this case.

Very truly yours, State Tax Commission, by S. E. Bates, Asst. Deputy.

CA.

[fol. 70] CLAIMANT'S EXHIBIT 11—LETTER FROM P. B. DIFFENDERFER, DATED APR. 10, 1931

Radio-Science Publications, Inc., 381 Fourth Avenue, New York

April 10th, 1931.

46582

Mr. Hutchinson, State Tax Department, 80 Center St., New York, N. Y.

DEAR MR. HUTCHINSON:

In compliance with your request of even date, I have requested our Vice-President and General Manager, Mr. Guy L. Harrington, to write to the Federal Income Tax Bureau, Washington, D. C., to secure photostatic copies of Federal Income Tax Returns of the Experimenter Publishing Co., Inc., 251 Fifth Avenue, New York, N. Y., for the years 1922 up to and including the year 1927, with copies of any final determinations that apply to these years.

As soon as such photostatic copies are received, I will see that they are promptly dispatched to you.

With kindest personal regards, I am,

Yours very truly, P. B. Diffenderfer.

P. B. Diffenderfer.
SR.

[fol. 71] CLAIMANT'S EXHIBIT 12—LETTER FROM P. B. DIFFENDERFER, DATED MAY 12, 1931

Radio-Science Publications, Inc., 381 Fourth Avenue, New York

May 12th, 1931.

Mr. C. W. Hutchins, Corporation Tax Bureau, 80 Center St., New York, N. Y.

DEAR MR. HUTCHINS: Confirming our conversation of even date, this is to advise you that the Treasury Department at Washington, D. C. asknowledged receipt of our letter of April 10th, wherein we requested certain photostatic copies of Federal Income Tax Returns as filed by the Experimenter Publishing Co., Inc., for the years 1922 to 1927, inclusive, and wherein they stated that it was necessary for us to forward an application over the signature of a principal officer, countersigned by the secretary under the corporate seal, together with an affidavit showing that we have acquired the Experimenter Publishing Co., Inc.

In compliance with the request of the Treasury Department's letter of April 24th, our Secretary, Mr. Byrd D. Wise, of the firm of Wise, Whitney & Parker, forwarded such application signed by Mr. Guy L. Harrington, Vice-President and General Manager, along with an affidavit as prepared by Mr. Gustav Gardner, Assistant Vice-President [fol. 72] of the Irving Trust Company, trustee in bankruptcy of the Experimenter Publishing Co., Inc., bankrupt, to the effect that we had purchased most of the assets of the above bankrupt.

Yours very truly, P. B. Diffenderfer, Comptroller.

P. B. Diffenderfer.
SR.

CLAIMANT'S EXHIBIT 13—LETTER TO COMMISSIONER OF INTERNAL REVENUE, DATED JUNE 4, 1931

June 4th, 1931.

Commissioner of Internal Revenue, Treasury Department, Washington, D. C.

File Reference: IT: R: F: G: J Y D

SIR: In compliance with your request to furnish certified affidavits in connection with the Experimenter Publish-

ing Co., Inc., adjudicated bankrupt in the U. S. District Court, Southern District of New York, (docket Number 46582), enclosed herewith, please find such affidavits.

[fol. 73] In this connection, we wish to obtain photostatic copies of the Federal Tax Returns filed by this corporation, from 1922 up to and including 1927, along with any final determinations of net income.

Please give this matter your prompt attention, as we need this information at an early date.

Yours very truly, P. B. Diffenderfer, Comptroller.

P. B. Diffenderfer.
SR.
Enc.

REFEREE'S EXHIBIT 1

This exhibit consists of the usual schedule of creditors and the amounts of their claims, executed by Experimenter Publishing Co., Inc., bankrupt, by Irving S. Manheimer, Secretary, and verified on March 8, 1929, filed in the office of the Clerk of the District Court for the Southern District of New York on March 11, 1929, of which schedules, Schedule A (1) reads as follows:

"Schedule A (1), No. —

Statement of All Creditors Who Were to be Paid in Full or to Whom Priority is Secured by Law

Claims which have priority	Amount, Dollars, cents
[fol. 74] 1. Taxes and debts due and owing the United States:	
Income Taxes Additional Assessments—1922.	12,280.84
Income Taxes Additional Assessments—1924-1925	6,008.62
Estimated maximum	18,289.46
2. Taxes due and owing to the State of —— or to any County, District or Municipality thereof	.....

3. Wages due workmen, Clerks or Servants to an amount not exceeding $300 each; earned within three months before filing the petition. See Attached Schedule of Wages	5,749.02
4. Other Debts having priority by Law	.....
Total	.....

Experimenter Publishing Company, Inc., Bankrupt, by Irving S. Manheimer, Secretary.

[fol. 75] It is stipulated that this exhibit need not be printed but may be produced by either party on the argument on the appeal herein and referred to in the briefs as if here set out at length.

Dated New York, March —, 1932.

John J. Bennett, Jr., Attorney General of the State of New York. S. John Block, Attorney for Appellants."

ORDER OF REFEREE OLNEY, DATED APRIL 10, 1929

At at court of bankruptcy held in and for the Southern District of New York, at the office of Referee Peter B. Olney, Jr., Esq., this 10th day of April, 1929.

Present: Honorable Peter B. Olney, Jr., Esq., Referee.

In Bankruptcy. No. 46582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

Whereas application has been made by the Trustee herein in its petition verified April 10th, 1929, annexed hereto, for the confirmation of the sale to a purchaser corporation to be organized by Bergan A. Mackinnon of 225 [fol. 76] Varick Street, New York City, in said District, of all of the property, business and franchises of the bankrupt, exclusive of certain radio stations, their licenses and appurtenances, certain lots of real estate and certain other items more specifically described in said petition, for a price in cash equivalent to the amount of all claims filed in the proceeding herein within the statutory period and

duly allowed, less the sum of $80,000, of which purchase price $23,750 in cash has been paid, as described in said petition, and $166,250 is to be paid within fifteen days from the date of the confirmation of said sale, and the balance as set forth in said petition; and

Whereas, the acceptance by the Trustee herein of the written bid of said Bergan A. Mackinnon, described in said petition, providing for the sale as aforesaid to said purchaser corporation, was made at an adjourned special meeting of creditors held on April 3, 1929 pursuant to due notice, as provided by Section 58-a (4) of the Bankruptcy Act; and

Whereas, the acceptance of said bid and the sale provided for thereunder had the unanimous approval of the creditors present or represented at said meeting;

Now, therefore, upon motion of Messrs. Root, Clark, Buckner, Howland & Ballantine and S. John Block, Esq., attorneys for the Trustee herein, it is

[fol. 77] Ordered that the acceptance of said bid and the sale provided for thereunder be and the same hereby are confirmed; and it is further

Ordered, that the Trustee herein, on receipt of the cash payment to be made within fifteen days from the date of such confirmation, complete the said sale by executing the proper instruments, transferring to said purchaser corporation all of the Trustee's right, title and interest in and to the property, business and franchises so purchased, and delivering the same to the said purchaser-corporation.

Peter B. Olney, Jr., Referee in Bankruptcy.

ORDER OF REFEREE OLNEY, DATED APRIL 10, 1929

At a court of Bankruptcy held in and for the Southern District of New York, at the office of Referee Peter B. Olney, Jr., Esq., this 10th day of April, 1929.

Present: Honorable Peter B. Olney, Jr., Esq., Referee.

In Bankruptcy. No. 46,582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

Whereas, application has been made by the Trustee herein in its petition verified April 10th, 1929, annexed hereto,

[fol. 78] for the confirmation of the sale to Chester W. Cuthell of 20 Pine Street, New York City, in said District, or to such corporation as he may designate, of the radio stations known as WRNY and W2XAL, and the licenses and appurtenances relating thereto, as described in said petition, for the total sum of $100,000 in cash, of which $10,000 in cash has been paid, as described in said petition, and the remaining $90,000 is to be paid within fifteen days from April 3, 1929; and

Whereas, the acceptance by the Trustee herein of the written bid of said Chester W. Cuthell, described in said petition, providing for said sale, was made at an adjourned special meeting of creditors held on April 3, 1929, pursuant to due notice as provided by Section 58-a (4) of the Bankruptcy Act; and

Whereas, the acceptance of said bid and the sale provided for thereunder had the unanimous approval of the creditors present or represented at said meeting;

Now, therefore, upon motion of Messrs. Root, Clark, Buckner, Howland & Ballantine, and S. John Block, Esq., attorneys for the Trustee herein, it is

Ordered that the acceptance of said bid and the sale provided for thereunder be and the same hereby are confirmed; and it is further

Ordered that the Trustee herein, on receipt of the balance of the cash payment provided for, complete the said [fol. 79] sale by executing the proper instruments, transferring to such purchaser or to such corporation as he may designate all of the Trustee's right, title and interest in and to the said radio stations and the licenses and appurtenances relating thereto, and delivering the same to said purchaser.

Peter B. Olney, Jr., Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 46582

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

PETITION OF IRVING TRUST COMPANY

To the Honorable Peter B. Olney, Jr., referee in bankruptcy:

The petition of Irving Trust Company respectfully shows as follows:

I. Your petitioner is the duly qualified and acting Trustee herein.

II. A special meeting of the creditors of the bankrupt herein was held on March 28, 1929, called upon ten days' written notice, copies of which were duly mailed to the [fol. 80] creditors, and duly published in accordance with the rules of this Court, stating the purpose of said meeting to be among other things the consideration of such bids for the assets and business as a whole, or for separate parcels thereof, (exclusive in any event of certain lots of real estate), as might be received. In conjunction with said meeting, a special meeting of the creditors of The Consrad Co., Inc., of which your petitioner is likewise the Trustee in Bankruptcy, was held upon similar notice. The two bankrupt companies were operated substantially as one unit from the office of the bankrupt herein at 230 Fifth Avenue, New York City; the officers, directors and stockholders of the two companies were substantially identical. The bankrupt herein published a number of magazines and undated publications and operated certain radio stations known as WRNY and W2XAL; The Consrad Co., Inc., published a quarterly magazine called "Radio Listeners' Guide and Call Book" and had substantially no other business; said quarterly magazine was distributed by and in the name of the bankrupt herein. Your petitioner as Trustee of the bankrupt herein has a claim against The Consrad Co., Inc., believed to be in excess of $100,000; it is believed that the total of all other claims or alleged claims against The Cons-

rad Co., Inc., does not exceed two or three thousand dollars and that accordingly, substantially all of the proceeds, less administration expenses, realized by your petitioner as Trustee of The Consrad Co., Inc. from the sale of the assets of The Consrad Co., Inc. will be available for distribution [fol. 81] to the creditors of the bankrupt herein.

II. At said special meetings bids were submitted for the purchase of the properties of the two bankrupt companies as a whole (exclusive of certain lots of real estate in Hempstead, Long Island, and of certain other items) and for the radio stations and certain magazines separately. In order to give your petitioner and a creditors' committee elected at said meetings, time to consider said bids in detail, said meetings were adjourned to April 3, 1929 with the understanding that at the adjourned meetings other bids might be received and bids previously submitted might be altered.

III. At the adjourned meetings on April 3, 1929, your petitioner as Trustee, with the approval of this Court and the unanimous approval of the creditors' committee and the other creditors present or represented, accepted the following bids:

(a) The bid of Chester W. Cuthell, of 20 Pine Street, New York City, of $100,000 in cash for the said radio stations and appurtenances, said bid specifically stating that no representation or warranty was being made by your petitioner as to the survival, assignability or renewability of the licenses to operate the said stations. Said bid, a copy of which is annexed hereto and marked Exhibit "A," provided for the payment of said purchase price as follows: [fol. 82] $10,000 in cash forthwith, which has been duly paid to your petitioner, and the balance, $90,000, within fifteen days from the date of acceptance, namely April 3, 1929. The appraised value of said radio stations was $7,500 for the physical properties, the appraisers estimating the good will value at from $20,000 to $30,000 additional.

(b) The bid of Bergan A. Mackinnon of 225 Varick Street, New York City, a copy of which is annexed hereto and marked Exhibit "B," for all of the assets and business of the bankrupt companies, exclusive of said lots of real estate, of the lease of said premises at 230 Fifth Avenue,

New York City, of the said claim of your petitioner as Trustee of the bankrupt herein against The Consrad Co., Inc., of said radio stations and their appurtenances, and of certain specified alleged causes of action of your petitioner as Trustee of said companies. Said bid provided for an immediate cash payment to your petitioner as Trustee of the bankrupt herein of $23,750 (which was duly paid to your petitioner, $1,250 in addition being paid to your petitioner as Trustee of The Consrad Co., Inc. on account of the sum of $10,000 to be paid to your petitioner for the assets and business of The Consrad Co., Inc.), for a further cash payment of $166,250 within fifteen days from the date of the confirmation of the sale, plus $8,750 to be paid at the same time to your petitioner as Trustee of The Consrad Co., Inc. to complete said cash payment for the assets of said Company, and for a final cash payment or payments of a sum or [fol. 83] sums equivalent to the amount of all claims proved and allowed in the proceedings herein and in the proceedings of The Consrad Co., Inc., less the total of $200,000 to be paid as aforesaid, less the sum of $100,000 (being the amount for which the bankrupt's radio stations were sold as hereinabove described), plus the sum of $20,000 as a contribution toward administration expenses. Said bid provided, among other things, that the purchase was to be made by a corporation to be organized by Mr. Mackinnon within five days from the date of the confirmation of the sale; it provided that said corporation upon its organization should issue to your petitioner as Trustee its non-interest bearing, non-negotiable promissory note in the principal amount of $200,000 payable September 20, 1929, to be held by your petitioner as security for the final cash payment or payments to be made as described above and estimated to be approximately $200,000 or somewhat more or somewhat less, depending upon the amount of claims proved and allowed as described above; the powers of said corporation, while said note is outstanding, to be restricted in various ways more specifically described in said bid, and said corporation to be required, in the event of default of the purchase price, to reconvey the properties to your petitioner upon summary order of the Court herein. In addition to the payments to be made by said corporation, the bid provided that Mr. Mackinnon would cause said corporation to assume and agree to pay and to hold your petitioner

[fol. 84] harmless from various obligations of the bankrupt companies and of your petitioner, both as Receiver and as Trustee thereof, including obligations to distributors and advertisers for credits or refunds on billings, and to printers and others for unpaid costs of publications incurred by your petitioner in the operation of the business. The appraised value of the properties covered by Mr. Mackinnon's bid was (excluding a $20,000 valuation placed on The Consrad Co., Inc. assets) $257,207.30; the initial cash payment already made and the cash payment to be made by Mr. Mackinnon within fifteen days from the date of confirmation total $190,000. Upon completion of all payments to be made under Mr. Mackinnon's bid and Mr. Cuthell's bid, the creditors (whose allowed claims may aggregate upwards of $500,000) will have received the full amount of their claims proved and allowed in the proceedings herein, less an amount by which the administration expenses herein may exceed the sum of $20,000.

IV. Mr. Mackinnon's bid was the only bid presented at said adjourned meetings for the business and publications as a whole, and was greatly in excess of the total of the highest bids presented at said meetings of March 28, 1929 for such of the several publications separately as were bid for in that manner. No other bids for separate publications were presented at said adjourned meetings. Mr. Cuthell's bid for the radio stations was the highest bid [fol. 85] presented at said adjourned meetings and represented an increase of $40,000 over the highest bid presented at said meetings on March 28, 1929. Similarly Mr. Mackinnon's bid represented a substantial increase over the bid presented by him at said meetings on March 28, 1929 and contained other terms substantially more favorable to the creditors than those contained in his earlier bid. Your petitioner believes that said bids were the highest that could have been obtained.

Wherefore your petitioner respectfully prays for the granting of the orders hereto annexed confirming the acceptance of said bids and of the sales provided for thereunder, and authorizing your petitioner to deliver to the purchaser corporation to be organized by Mr. Mackinnon, upon receipt of the cash payment to be made within fifteen

days from the date of confirmation, and to Mr. Cuthell, upon receipt of the cash payment to be made by him within fifteen days from April 3, 1929, proper instruments transferring to them the respective properties purchased by them.

Irving Trust Company, as Trustee in Bankruptcy of Experimenter Publishing Co., Inc., by Gustav Gardner, Assistant Vice-President.

Dated New York, N. Y., April 9, 1929.

[fol. 86] *Duly sworn to by Gustav Gardner. Jurat omitted in printing.*

[fol. 87] EXHIBIT "A" TO PETITION OF IRVING TRUST COMPANY

April 3, 1929.

Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Co., Inc., 233 Broadway, New York, New York.

DEAR SIRS: The undersigned hereby agrees to pay to you, as Trustee in Bankruptcy of Experimenter Publishing Company, Inc., the sum of $100,000.00 in cash, for all of your right, title and interest in and to the Radio Broadcasting Stations known as WRNY and W2XAL, together with all equipment and appurtenances thereof, it being specifically understood that you make no representations or warranty as to survival, assignability or renewability of licenses or rights to operate.

Said payment is to be made as follows:

$10,000.00 in cash forthwith upon your acceptance of this offer, and the balance, being $90,000.00, in cash within fifteen days from the date of such acceptance.

Very truly yours, Chester W. Cuthell.

[fol. 88] April 9, 1929.

Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Co., Inc., 233 Broadway, New York, New York.

DEAR SIRS: I understand that it will be satisfactory to you, upon receipt in full of the cash payments provided for

in my written offer to you of April 3, 1929, which you have accepted, to assign and transfer either to myself or to a corporation to be designated by me, all of your right, title and interest as Trustee in and to the Radio Broadcasting Stations known as WRNY and W2XAL, together with all equipment and appurtenances thereof, it being specifically understood that you make no representations or warranty as to survival, assignability or renewability of licenses or rights to operate.

Very truly yours, Chester W. Cuthell.

[fol. 89] EXHIBIT "B" TO PETITION OF IRVING TRUST COMPANY

April 2, 1929.

Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Company, Inc., and of the Consrad Co., Inc., 233 Broadway, New York, N. Y.

DEAR SIRS: I submit to you the following offer:

1. I will cause to be organized a corporation hereinafter described (and sometimes hereinafter referred to as the purchaser corporation) and will cause said purchaser corporation to purchase from you, upon the terms and conditions hereinafter set forth, all of your right, title and interest as Trustee in Bankruptcy of Experimenter Publishing Company, Inc. and of The Consrad Co., Inc., in and to all of the assets, property and business of said Companies of whatsoever nature and wheresoever located, with the exception of—

(a) Five (5) certain lots of real property located at Hempstead, Long Island, New York.

(b) All claims which the Experimenter Publishing Company, Inc. or you as Trustee of said Company may have against The Consrad Co., Inc.

(c) All claims or causes of action which you may have against former officers, directors or stockholders of either or both of the said Companies.

[fol. 90] (d) The lease of the premises on the 18th floor of 230 Fifth Avenue, New York City.

(e) The radio station, licenses thereto with all equipment and appurtenances.

Without limiting the generality of the foregoing, it is understood that included in the assets and business which the purchaser corporation is to acquire are the publications known as "Amazing Stories", "Amazing Stories Quarterly", "Your Body Quarterly", "Science and Invention", "Radio News", "Radio Listeners' Guide and Call Book", and all undated publications and books, together with all trade names, trademarks, goodwill, copyrights, cuts, blue prints, paper, work in process, subscription lists and accounts receivable; all furniture and office equipment and other articles of personal property located in the said premises at 230 Fifth Avenue, New York City, all notes receivable, account receivable, postage deposits and other receivables, and cash on hand, including any rights, claims or causes of action which the Trustee or the bankrupt Companies or either of them may have, exclusive of the claims and causes of action hereinabove specified.

2. In consideration of the sale to the purchaser corporation of the assets, property and business covered by this offer:

(a) I will cause said purchaser corporation to pay to you a sum equal to the total of all claims of creditors which [fol. 91] shall be proved and allowed in the bankruptcy proceedings of the said Companies, less $80,000, but excluding the claim of Experimenter Publishing Company, Inc. or yourself as its trustee against The Consrad Co., Inc. The said purchase price to be paid as follows:

(1) $200,000 in cash within fifteen days from the date of the confirmation of the sale by the Court upon your delivery to the purchaser corporation at the time of such payment (hereinafter sometimes referred to as the date or time of closing) of proper bills of sale and instruments of assignment, selling, transferring and assigning to said purchaser corporation all your right, title and interest in and to the assets, property and business covered by this offer.

(2) By executing and delivering to you at the said time of closing on account of and as security for payment of the balance, the non-interest bearing, non-negotiable promis-

sory note of said purchaser corporation in the principal amount of $200,000 payable to you as Trustee September 20, 1929, at Irving Trust Company, 233 Broadway, New York City.

(3) On or before September 19, 1929, you will deliver to the said purchaser corporation a certificate of the Referee in Bankruptcy having jurisdiction of the bankrupt estates or other proper proof setting forth claims which have been proved and allowed in the respective bankruptcy proceedings and the claims which have been filed but not yet al- [fol. 92] lowed or whose status is otherwise still undetermined. Upon receipt of such certificate the purchaser corporation shall pay to you in cash on September 20, 1929, the difference between the total of all claims shown by said certificate to have been allowed, less $80,000 (also excluding the claim of Experimenter against Consrad) and the amount of cash theretofore paid on account of the purchase price and shall deliver to you its forthcoming bond in a total amount equal to the claims whose status is then still undetermined and conditioned to pay to you in cash the amount of such undetermined claims as and when such claims shall be finally allowed, said $200,000 note to be cancelled and returned to the corporation. Said bond shall be surrendered to the purchaser corporation and cancelled when all claims shall have been determined and the amount of cash payable hereunder shall have been paid by the purchaser corporation.

(b) I will cause the said purchaser corporation to assume and agree to pay and hold you harmless from and against the following:

(1) All obligations and liabilities of the Experimenter Publishing Company, Inc. and The Consrad Co., Inc., or of yourselves, as Receiver and/or Trustee of such Companies, to wholesale and retail distributors of the various publications, both dated and undated, of said Companies, including all obligations and liabilities arising out of any and all rights which said distributors or any of them may have to credits for returns already made and hereafter to [fol. 93] be made of unsold publications, whether dated or undated and whether distributed prior or subsequent to the filing of the petition in bankruptcy, and arising out of any

rights of such distributors or any of them to the return or to the payment of all or any part of the cash deposits heretofore made by them to the said Companies or either of them;

(2) All obligations and liabilities of the said Companies or either of them, or of yourselves as Receiver and/or Trustee of said Companies, to advertisers in the various publications, whether dated or undated, including all obligations and liabilities, accrued and to accrue, arising out of the right of such advertisers to receive credits in adjustment of net paid circulation;

(3) All obligations to subscribers for the several publications; and

(4) All obligations and liabilities of yourselves, as Receiver and/or Trustee in Bankruptcy, for unpaid publication costs incurred by yourselves as such Receiver and/or Trustee, including, but without limiting the generality of the foregoing, paper, manuscripts, typesetting, composition, art work, printing and shipping, heretofore or hereafter furnished to you or ordered or performed at your request, and all other costs of conducting business, to the extent that such items remain unpaid at the time of closing hereunder.

[fol. 94] (c) I will cause the said purchaser corporation to agree to hold you harmless from and against any and all liability or claim thereof, arising out of the conduct of the business by yourselves as Receiver and/or Trustee in Bankruptcy, up to the time of closing hereunder.

(d) I will cause the said purchaser corporation to execute and deliver, upon demand, all such instruments as in the opinion of your attorneys and my attorneys may be reasonably required to effectuate all undertakings herein contained, it being understood that this letter to you, upon acceptance of the terms herein contained and confirmation by the Court of sale hereunder, shall constitute a bonding agreement.

3. It is understood that upon acceptance of the offer herein contained and the sale as aforesaid, the attorneys for the undersigned or for the said purchaser corporation shall be authorized (a) to examine all proofs of claim now

or hereafter filed in the bankruptcy proceedings, and (b) to oppose at my or the said purchaser corporation's sole cost and expense, the allowance of any and all claims which in the opinion of Wise, Whitney and Parker and the Trustee should be contested in whole or in part, any contest to be instituted within two months after such claim is filed or if such claim is already filed within two months after confirmation of such hereunder.

(4) Of the cash payment to be made to you by the purchaser corporation, $10,000 shall be deemed to be payment [fol. 95] in full for all of your right, title and interest, as Trustee in Bankruptcy of the Consrad Company, Inc. in and to the "Radio Listeners' Guide and Call Book" and any other assets and property acquired by you as such Trustee.

5. I will cause the purchaser corporation to be organized as promptly as possible and not later than five (5) days from the date of the confirmation of the sale by the Court, under the laws of the State of New York or of any other State acceptable to your attorneys, and will cause provision to be made in the Certificate of Incorporation of said corporation, or otherwise in form satisfactory to your attorneys, providing among other things that until the $200,000 note provided for hereunder shall have been duly paid and cancelled, the corporation shall have no power (a) to mortgage, pledge or encumber any of its property of whatsoever description; (b) to declare or pay any dividends upon or to set apart any of its surplus or net profits or other property as a sinking fund for the redemption or otherwise for the account of any shares of its capital stock; (c) to create any other indebtedness represented by its notes or other corporate obligations, it being understood, however, that the corporation shall be entitled to secure ordinary trade and bank credit constituting current liabilities in the ordinary course of business. I further undertake that Harvey K. Fly and myself, or a corporation of which we shall own control, will acquire upon the organiza- [fol. 96] tion of said purchaser corporation, and will continue to hold so long as any of said notes remain outstanding, not less than a majority of the number of shares at any time outstanding and entitled to vote for the election of directors. I further undertake that provision shall be

made, in form satisfactory to your attorneys, providing that no management salaries or management compensation shall be payable to Mr. Fly and myself so long as said $200,000 note remains outstanding and unpaid.

6. The offer hereinabove set forth is contingent upon your continuance of the business of Experimenter Publishing Company, Inc. up to the time of closing hereunder in substantially the manner in which it is now being continued by you.

7. All questions or disputes which may arise between the parties hereunder either before or after the date of closing may be determined by the United States District Court for the Southern District of New York, or any Judge thereof, upon motion of either party to be brought on by the usual notice of motion, the parties hereby submitting themselves to the jurisdiction of the said Court for determination of al such questions or disputes.

Bergan A. Mackinnon.

The undersigned hereby makes the following amendments and supplements to this offer:

(1) The undersigned will deposit with Irving Trust Company, forthwith upon the acceptance of this offer, [fol. 97] Twenty-five Thousand Dollars in cash, as earnest money for the performance of the obligations of the undersigned, said amount to be credited against the stipulated initial payment of Two Hundred Thousand Dollars in cash. In the event of default in such cash payment, the said Twenty-five Thousand Dollars shall be retained by the Trustee as liquidated damages, and the Trustee shall have no other remedy against myself or the Purchaser Corporation.

(2) Until all payments to the Trustee provided for in this offer shall have been made, the purchaser corporation, before committing itself to payment of any salary or salaries of $10,000 per annum or more, to any individual or individuals, will report to the Trustee in writing its intention to do so, and thereupon the Trustee may object to the payment of all or any such salaries, and either party may bring on the matter for hearing and determination as set forth in foregoing paragraph 7 hereof.

(3) Until all payments to the Trustee provided for in this offer shall have been made, the purchaser corporation will not, without the prior written approval in each instance of the Trustee, make any sale or sales of any property acquired from the Trustee, except in the regular course of the purchaser corporation's ordinary business. The proceeds, if any such sales are approved, shall be applied in every case to reduction of the unpaid balance of [fol. 98] the purchase price. In the event that the Trustee refuses approval, the matter may be submitted to the Court under paragraph 7 hereof. The provisions of this paragraph shall not apply to the sale of the Radio Stations and equipment, which matter is already hereinbefore specifically covered.

(4) The undersigned agrees that in the event of any alleged default on his or the said purchaser corporation's part, the same may be submitted to the Court under foregoing paragraph 7 hereof, and unless cured pursuant to the order of the Court within such time as may be stipulated in such order, the Court may enter a summary order for the reconveyance to the Trustee of all the property of the purchaser corporation acquired from the Trustee hereunder except the Radio Station (if then resold) and any other property resold with the consent of the Trustee, and the purchaser corporation shall forthwith make such reconveyance; it being understood that on any re-sale or re-sales by the Trustee of the property so reconveyed, any surplus of the proceeds of such re-sale or re-sales, after all creditors whose claims have been proved and allowed have been paid in full, and after the payment in full of all administration expenses, including all expenses connected with obtaining such reconveyance and effecting such re-sale or re-sales, shall be paid to the purchaser corporation.

(5) The properties acquired shall be free of all liabilities except those expressly assumed hereunder, and the [fol. 99] Trustee shall cancel any and all contracts at the request of the Purchaser corporation, the Purchaser corporation, however, to hold the Trustee harmless from any liability with respect to such cancellation.

(6) The validity of no part of this agreement shall be affected by the invalidity of any other part.

(7) The attorneys for the Trustee may require that provisions to insure performance of paragraphs (2) and (3) of the foregoing amendments and supplements shall be included in the certificate of incorporation of the purchaser corporation.

April 2, 1929.

Bergan A. Mackinnon.

In United States District Court, Southern District of New York

In Bankruptcy. No. 46582

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Schedule of Referee, Dated Sept. 20, 1929

I hereby certify that Schedule I, attached hereto and made part hereof, is a complete list of claims filed with and [fol. 100] allowed by me in the above entitled proceeding, against which no objection or petition for reconsideration has been filed.

Schedule II, attached hereto and made part hereof, is a complete list of claims filed with and allowed by me in the above entitled proceeding against which objections or petitions for reconsideration have been filed said objections or petitions not having been adjudicated or which have yet to be liquidated.

Schedule III, attached hereto and made part hereof, is a complete list of claims filed with and allowed by me against which objections or petitions for reconsideration have been filed, said claims having since been amended, reduced by order after hearing or by stipulation, the amounts indicated being the sum finally arrived at as being correct.

Peter B. Olney, Jr., Referee.

Dated New York, September 20th, 1929.

"Schedule I consists of four pages enumerating 87 creditors whose claims total $383,528.30.

"Schedule II consists of two pages enumerating 76 creditors whose claims total $165,983.78.

"Schedule III consists of one page enumerating 8 creditors whose claims total $20,218.02.

[fol. 101] "It is hereby stipulated and agreed that this exhibit need not be printed. Either party to this appeal may produce and submit to the Court at the time of argument of the appeal the original of said certificate and the schedules annexed thereto may refer to said certificate and schedules in the briefs as if they were here set out at length."

In United States District Court, Southern District of New York

In Bankruptcy

In the Matter of Experimenter Publishing Co., Inc., Bankrupt

Referee's Decision

The notice of unliquidated claim of franchise tax for year beginning November 1, 1928, filed by the State of New York on March 29, 1929, was concededly filed in time. The Bankruptcy Act contemplates the filing of unliquidated claims and the process for their liquidation in such manner as the court shall direct and thereafter for their proof and allowance against the bankrupt estate. Section 63-b. Therefore, in my opinion, the motion as to this notice must be denied.

[fol. 102] The second notice filed October 20, 1929, more than six months after adjudication and over a month after September 16, 1929, the date fixed by the bar order served on the State of New York, was also a notice of unliquidated claim. In addition to being a notice of unliquidated claim for franchise tax for year beginning November 1, 1928, it was also a notice of unliquidated claims for additional franchise taxes for years beginning November 1, 1917 to 1928, inclusive. As to this notice, in my opinion, the motion should be granted on the authority of Re Mutual Parlor Suite Co., 11 A. B. R., N. S. 116; holding that a claim for taxes cannot be filed after the expiration of the bar order date. The State has only itself to blame for the situation it finds itself in as the record indicates that facts

were within its knowledge upon which it could have filed this claim prior to September 16, 1929, the date fixed in the bar order. S. M. 13 and 14.

Settle order on notice.

Dated New York, August 20, 1931.

Peter B. Olney, Jr., Referee.

[fol. 103] In United States District Court

[Title omitted]

Petition for Review of Referee's Order and Judgment

To Hon. Peter B. Olney, Jr., referee in bankruptcy:

Your petitioner herein, the Department of Taxation and Finance of the State of New York, respectfully shows:

1st. That during the course of the proceeding, the trustee in bankruptcy obtained and served on the petitioner, an order of this Court directing that all claims of the State of New York for taxes be filed on or before September 16, 1929.

2nd. That notice of unliquidated claim of franchise taxes for the year beginning November 1, 1928, was filed with this Court by the petitioner herein on March 29, 1929.

3rd. That a further and additional notice of unliquidated claim of the State of New York for the tax year beginning November 1, 1928 and also for additional franchise taxes as imposed under Section 219-D of Article 9-A of the Tax Law for tax years beginning November 1, 1917 to November 1, 1928, inclusive, was filed with this Court by the petitioner on October 20, 1929.

[fol. 104] 4th. That thereafter, the trustee of the bankrupt made a motion before the Referee herein to strike from the files of the Referee in the above-entitled matter the two (2) aforesaid notices for taxes; and to cancel and expunge said notices and directing said trustee to disregard such notices or any claims filed in support thereof.

5th. That said motion came on before the Referee and evidence was taken before him; and he has made his decision determining as follows:

1. That the notice of unliquidated claim of franchise tax for the year beginning November 1, 1928 filed on March 29, 1929 was filed in due time; and denied the motion of the trustee with respect thereto.

2. That the said notice of unliquidated claim for the tax year beginning November 1, 1928 and for additional franchise taxes for tax years beginning November 1, 1917, to November 1, 1928, inclusive, filed on October 20, 1929, over a month after September 16, 1929, the date fixed by the bar order aforesaid; and with respect to this notice, the Referee granted the motion of the trustee, as shown in his opinion, dated and filed August 20, 1931.

6th. That the said decision was contrary to the evidence and contrary to the law.

7th. That subsequently and on or about the 2nd day of September, 1931, an order was made and entered, giving force and effect to the said decision and carrying out the provisions thereof.

[fol. 105] Wherefore your petitioner feeling aggrieved because of such order, prays that the same may be reviewed as provided for in the Bankruptcy Law and General Order No. 27.

Department of Taxation & Finance of the State of New York, Office & P. O. Address 80 Center Street, New York, N. Y., by John J. Bennett, Jr., Attorney-General of the State of New York. Anthony P. Ludden, of Counsel.

Duly sworn to by Charles W. Hutchins. Jurat omitted in printing.

[fol. 106] In United States District Court

[Title omitted]

Referee's Certificate on Petition for Review

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Peter B. Olney, Jr., the Referee herein, do hereby pursuant to General Order XXVII certify as follows:

The question certified for review is whether I erred in making my order dated September 2, 1931, sought to be

reviewed, in so far as I granted trustee's motion to expunge a notice of unliquidated claim for taxes filed by the State of New York on October 20th, 1929, and to direct the trustee to disregard said notice. The motion was granted in this respect, because said notice was filed after the expiration of the date fixed for filing any claim by the State of New York by a so-called bar order, duly served on the State of New York, October 20th, 1929, the date when said notice was filed was also more than six months after the date of adjudication (Bankruptcy Act, Sec. 57N).

[fol. 107] There is submitted herewith the notice of motion dated March 30th, 1931, the affidavit of Robert L. Smith verified March 30th, 1931 annexed to said notice of motion and the exhibits thereto annexed; the stenographic minutes of the proceedings before me, Referee's memorandum of opinion dated August 20th, 1931, the said order sought to be reviewed dated September 2nd, 1931, and the petition to review verified September 17th, 1931.

Dated New York, September 23rd, 1931.

Respectfully submitted,

Peter B. Olney, Jr. (SGN), Referee.

The motion for hearing hereon should be brought before the Judge sitting in Bankruptcy on Wednesday, September 30, 1931.

Peter B. Olney, Jr. (SGN), Referee.

[fol. 108] In United States District Court

[Title omitted]

Notice of Motion on Petition for Review

Sir: Please take notice that the petition of the Department of Taxation and Finance of the State of New York for review of the decision and order of the Hon. Peter B. Olney, Jr., Referee, dated September 2nd, 1931, will be brought on for hearing at a Term of this Court, before the Judge then presiding and hearing motions in bankruptcy, at the Post-Office Building, in the Borough of Manhattan, City and State of New York on the 30th day of September, 1931, at 10:30 A. M., or as soon thereafter as counsel may

be heard, and that at the said time and place, the undersigned will move for the modification of the aforesaid order to permit the Department of Taxation and Finance of the State of New York to file notice of an unliquidated claim for franchise taxes due from the above-named bankrupt for the tax year beginning November 1, 1928, and also notice of an unliquidated claim for additional franchise taxes, as imposed by Section 219 d Article 9 of the [fol. 109] Tax Law of the State of New York for the tax years beginning November 1, 1917 to November 1, 1928, inclusive, together with interest, and that said tax claims be reinstated as legal and valid claims in the above proceeding, and that the State of New York be given an opportunity to present evidence and proof in support of its claims herein.

Dated New York, N. Y., September 25th, 1931.

Yours, etc., John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the Dept. of Taxation and Finance of the State of New York. Office & P. O. address: Capitol, Albany, N. Y., New York City Bureau, 80 Centre Street.

To S. John Block and Root, Clark & Buckner, Esqs., Attorneys for Trustee, 225 Broadway, New York City.

[fol. 110] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt

In Bankruptcy

OPINION DISMISSING PETITION TO REVIEW

F. J. COLEMAN, J.:

Petition to review order of referee expunging claim for New York State franchise tax. The adjudication in bankruptcy took place March 6, 1929 and on July 18, 1929, a tax bar order was duly served requiring the State to file its proof of tax claims within sixty days which expired on September 16, 1929. Immediately after the adjudication the State had

filed two notices of claims and on October 20th more than a month after the expiration of the tax bar period, it filed a third notice of claim for an unliquidated amount. The trustee moved to expunge one of the notices which was timely filed and the one which was filed after the expiration of the tax bar period. The referee granted the motion as to the latter and denied it as to the former. The State now presents this petition to review the expunging of the one notice.

The notice of claim was filed more than a month after the expiration of the tax bar period and for that reason must be [fol. 111] expunged. The State had made no application to open its default and for leave to file a claim after the time provided by the bar order. It is impossible to determine upon the papers before me whether such application should be granted when it is made. Certainly the State has been extremely dilatory and remiss in regard to this matter. That may not in itself be sufficient to deprive it of the right to share in the undistributed assets because it does not sufficiently appear how such conduct may have prejudiced others. 85% of the assets have already been disbursed, but there still remains approximately $50,000. To permit this sum to be tied up for an indefinite period in the future because of an unliquidated claim by the State which the latter is doing nothing to have determined would be a gross injustice to the creditors who unquestionably at this time could make good use of their money. Judging by the State's conduct in the past in this matter, if the claim is not expunged the fund will remain in the Court for years to come.

The order of the referee is, therefore, affirmed and the petition dismissed.

Frank J. Coleman, U. S. D. J.

November 19, 1931.

[fol. 112] In United States District Court

[Titled omitted]

Petition for Appeal and Order Allowing Same

The People of the State of New York, claimant, against the above-named bankrupt, considering itself aggrieved by

the order dated December 4, 1931 and entered in the office of the Clerk of this Court on the 9th day of December, 1931, which said order confirmed an order of Hon. Peter B. Olney, Jr., referee herein, dated September 2, 1931, expunging certain tax claims of the State of New York, and which said order of this Court further dismissed a petition for review filed herein on September 18, 1931, do hereby appeal to the United States Circuit Court of Appeals, in and for the Second Circuit, from said order of this Court and from each and every part thereof as well as the whole thereof, for the reasons specified in the assignment of errors filed herein and herewith, and all other errors that may have been made, [fol. 113] and the said the People of the State of New York hereby pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which such order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Second Circuit, and that the said order of confirmance be reversed and the Referee in bankruptcy herein ordered to receive and pass upon the tax claims of the State of New York as filed by said claimant, and for such other and further relief as to the Court may seem just and proper.

Dated New York, N. Y., December 14th, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Claimant, The People of the State of New York. Office & P. O. address: Capitol, Albany, N. Y.

Allowance of Appeal

And now, to wit, this 14th day of December, A. D. 1931, upon reading and considering the foregoing petition, it is, upon motion of John J. Bennett, Jr., attorney for appellant,

Ordered by the Court that the foregoing appeal be and hereby is allowed, and the Trustee of said bankrupt, by S. [fol. 114] John Block, Esq., its attorney, waiving the giving of a bond for costs by appellant, no order as to bond is made.

Dated N. Y., Dec. 15, 1931.

Frank J. Coleman, U. S. D. J.

In United States District Court

Stipulation Waiving Bond

It is hereby stipulated and agreed that the Trustee in Bankruptcy herein waives the giving of a bond for costs by the People of the State of New York in connection with the appeal to the United States Circuit Court of Appeals for the Second Circuit from the order dated December 4, 1931, expunging a notice of unliquidated claim of the State of New York for taxes.

Dated December 15, 1931.

Irving Trust Company, Trustee in Bankruptcy, by S. John Block, Attorney.

[fol. 115] Citation, in usual form, omitted in printing.

[fol. 116] In United States District Court

[Title omitted]

Stipulation and Order Extending Time

It is hereby stipulated and consented that the time of the appellants, the People of the State of New York, to docket the case and file the record herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be enlarged and the time extended for thirty days, to and including the 15th day of March, 1932, and [fol. 117] that an order may be entered hereon without notice.

Dated January 19, 1932.

John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the People of the State of New York, Appellant. S. John Block, Attorney for Trustee-Respondent.

So ordered, Jan. 20, 1931.

John C. Knox, U. S. D. J.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated that the foregoing is a true and complete transcript of the record of the United States District Court for the Southern District of New York in the matter involved in this appeal.

Dated New York, March —, 1932.

John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for State-Appellant. S. John Block, Attorney for Trustee-Appellee.

[fol. 118] IN UNITED STATES DISTRICT COURT

ORDER FILING TRANSCRIPT

On the consent of the attorneys for the respective parties the foregoing printed record is hereby ordered filed for the purpose of certifying a record on appeal.

Dated New York, N. Y., March —, 1932.

F. J. Coleman, United States District Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 119] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1931

No. 404

Argued May 13, 1932. Decided May 23, 1932

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt; THE PEOPLE OF THE STATE OF NEW YORK, Appellant; IRVING TRUST COMPANY, as Trustee in Bankruptcy, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges

The order appealed from expunged a notice of unliquidated claim for additional franchise taxes due to the state of New York from the bankrupt for the tax years

beginning November 1, 1917 to 1928, inclusive. The People of the State of New York appeal. Order affirmed.

S. John Block and Root, Clark & Buckner, all of New York City (S. John Block and Robert Halpern, both of New York City, of counsel), for Irving Trust Co., trustee.

John J. Bennett, Jr., Atty. Gen. (Robert P. Beyer, Deputy Asst. Atty. Gen., of counsel), for appellee.

OPINION

Per CURIAM:

The referee's order expunging the claim filed by the people of the state of New York against the collector of internal revenue, was affirmed by the District Court. The order entered expunged the record of an unliquidated claim for additional franchise taxes due to the state of New York from the bankrupt for the tax years beginning November 1, 1917 to 1928, inclusive. The reason therefor was that the appellant did not file its claim within the time allowed by the tax bar order. We have heretofore held that orders such as that appealed from had binding effect upon sovereigns and must be complied with. Matter of Morgenstern & Co., Bankrupt, 57 F. (2d) 163 decided April 4, 1932 (C. C. A. 2d Cir.); In re Anderson, 279 F. 525 (C. C. A. 2). Upon the authority of these cases, the order appealed from is affirmed, but without prejudice to an application by the people of the state of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment.

Order affirmed.

[fol. 120] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of EXPERIMENTER PUBLISHING CO., INC., Bankrupt; People of the State of New York, Appellant

DECREE—Filed May 31, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 121] [File endorsement omitted.]

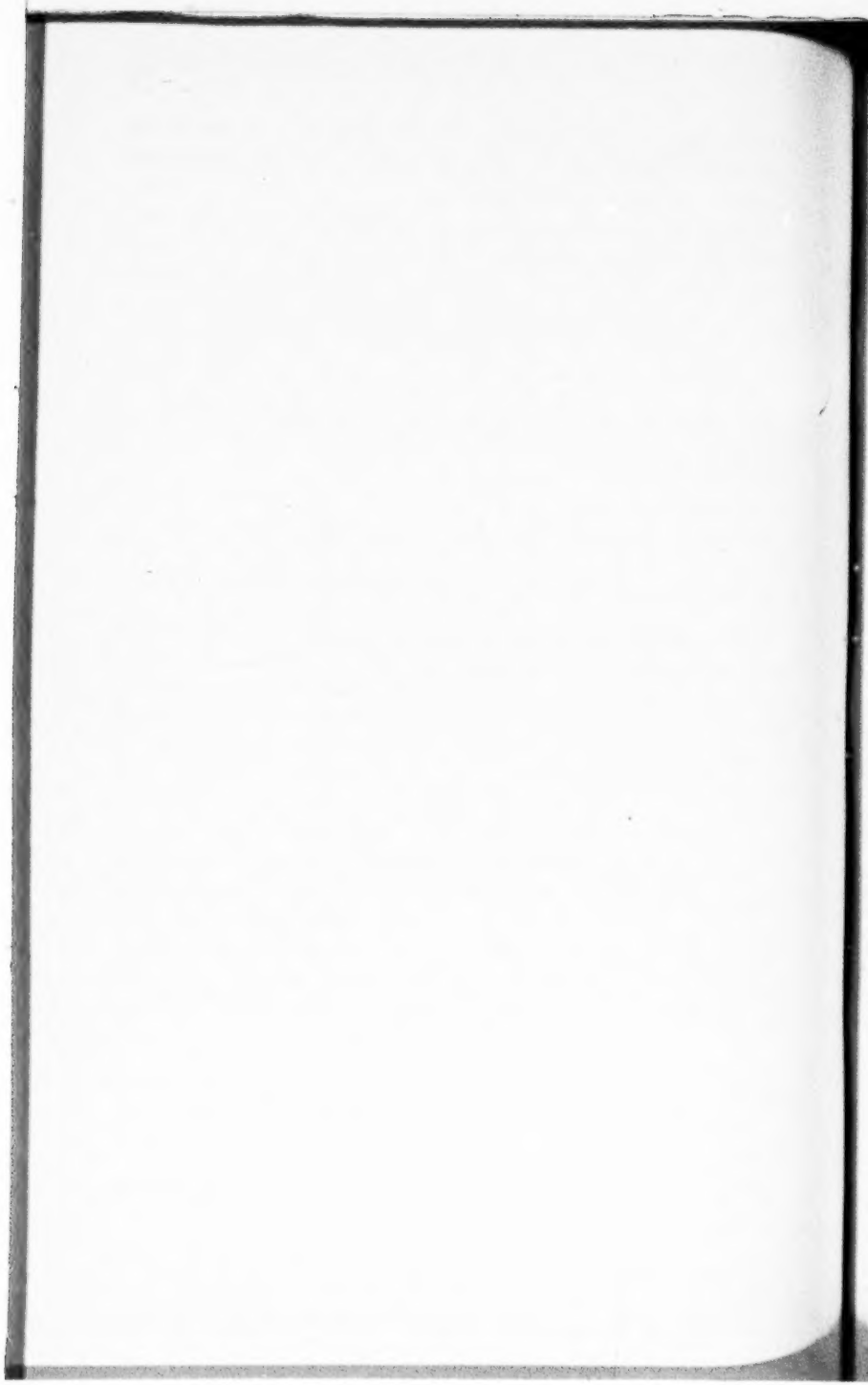
[fol. 122] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 123] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,001. U. S. Circuit Court of Appeals, Second Circuit. Term No. 304. The People of the State of New York, petitioners, vs. Irving Trust Company, as trustee in bankruptcy of Experimenter Publishing Co., Inc., bankrupt. Petition for a writ of certiorari and exhibit thereto. Filed August 17, 1932. File No. 37,001.



FILE COPY

FILED
OCT 28
CHARLES ELMORE

Supreme Court of the United States

October Term, 1932.

No. 304.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners-Appellants,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC.,

Respondent-Appellee.

MOTION TO ADVANCE.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,
Capitol, Albany, New York.

ROBERT P. BEYER,
Deputy Assistant Attorney General
Of counsel for Petitioners-Appellants,
80 Centre Street, New York City, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK, *Petitioners-Appellants,* against IRVING TRUST COMPANY, as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., *Respondent-Appellee.*	October Term, A. D., 1932. No. 304.

Notice.

To: S. John Block,
Counsel for Appellee,
225 Broadway, New York City.

SIR:

PLEASE TAKE NOTICE that on the 21st day of November, 1932, or as soon thereafter as counsel can be heard, the within motion to advance will be submitted to the Supreme Court of the United States in the City of Washington, District of Columbia.

Printed copy of the motion to advance is served upon you herewith.

ROBERT P. BEYER,
Counsel for Appellants,
80 Centre Street,
Borough of Manhattan,
City of New York.

Service accepted this 29th day of October, 1932.

S. JOHN BLOCK,
Counsel for Appellee.

Motion to Advance.

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK, *Petitioners-Appellants,* against IRVING TRUST COMPANY, as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., *Respondent-Appellee.*	October Term, A. D., 1932. No. 304.

Now comes The People of the State of New York, petitioners-appellants, and move this Honorable Court that this cause be advanced for early hearing and placed upon the summary docket of this Court, and in support of its motion makes the following brief statement of the matter involved and the reasons relied upon for the advancement:

1. That this matter comes before this Court upon the allowance of an application by the People of the State of New York for a writ of certiorari to review the determination of the United States Circuit Court of Appeals for the Second Circuit, barring notices of claim filed by the petitioners in a bankruptcy proceeding after the time limited for

filing a claim by a bar order issued by a referee in bankruptcy but before the final liquidation of the bankrupt estate.

2. In granting the petition for certiorari, this Court has consented to pass upon and determine the following three questions, which are involved for review and which, as stated in the petition for the writ of certiorari, are as follows:

> Question No. 1—Has the United States District Court or a referee in bankruptcy the constitutional power and authority to make an order in a bankruptcy proceeding requiring a sovereign state to file tax claims with the referee in bankruptcy within a prescribed definite period or be thereafter barred from filing any such claims?
>
> Question No. 2—Where a referee in bankruptcy makes an order requiring a state to file any tax claim within sixty days after the service of a copy of said order, and where the State files a claim for additional taxes one month and four days after the expiration of the time limited by said order, which said claim was permitted to remain on file with the referee for a period of one year and five months from the date of filing before any motion was made to expunge the same because not filed in time, has the referee in bankruptcy the constitutional right and authority to grant a motion to expunge said claim because not filed within the time prescribed in said order in a case where there are sufficient undistributed assets of said bankrupt to pay the said claim in full, upon the same being established as to amount by the referee in bankruptcy.
>
> Question No. 3—In a case where a referee in bankruptcy makes an order requiring a state to file any tax claim within a period of sixty days from the date of service of said order; where the state files a claim for possible increased franchise taxes, determinable as to amount on a reaudit of income for the tax years in question made in connection with the claims for additional tax liabilities for the same year filed by the United States Government, said claim being filed by

the State one month and four days after the expiration of the time limited by said order; where said claim is permitted to remain on file with the referee in bankruptcy for a period of one year and five months before any motion is made to expunge same, has the referee in bankruptcy the constitutional power and authority to grant a motion to expunge said claim because not filed within the period prescribed in said order, without making a determination as to the amount of income earned by the bankrupt in the tax years in question in connection with additional tax claims filed by the United States Government, and without, by this method, determining the true amount of taxes due by the bankrupt to the State, in a case where there are undistributed assets of the bankrupt more than sufficient to pay such tax liability as thus adjudicated to the State in full?

3. That the early and final determination of the questions involved in this case is not only of paramount public importance to the administration of the tax systems of the various states, but also in the proper administration of the bankruptcy system in the declaration of the duties of trustees and referees in bankruptcy with respect to the filing of, determination, allowance and payment of tax obligations due by a bankrupt to either a State or the National Government. The questions involved arise in all bankruptcy proceedings in which the bankrupt is a corporation. They are of particular importance therein inasmuch as the validity and legality of so-called bar orders, made in accordance with Court rule, are involved. In these orders it is attempted to limit the time within which a State or the National Government is required to file a claim for a tax liability or be thereafter barred from presenting such claim. The petitioners-appellants claim before this Court that such orders are of no binding effect upon a sovereign state, particularly in a case where final distribution of the assets of the bankrupt in the hands of the trustee has not

been made. It is therefore of vital public importance that the questions involved be determined by this Court as speedily as possible so that a proper and final guide for administration of corporate assets in bankruptcy may be obtained.

4. A more detailed statement of the case is contained in the petition of petitioners-appellants on file in this cause and on which this Court has issued a writ of certiorari.

5. That this is not a cause which will require any extended argument as all the facts are practically conceded and simple in nature, with only the necessity of a brief argument as to the law to be applied in the correct determination of this cause.

6. If this Honorable Court will place this cause upon the summary docket for hearing, the petitioners submit with confidence that this Court will reverse the Circuit Court of the United States for the Second Circuit and definitely establish the true rule and guide for corporation bankruptcy proceedings in receiving, adjudicating, allowing and paying claims due on account of State and Federal taxes,

WHEREFORE, People of the State of New York, petitioners-appellants, pray that the cause be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

PEOPLE OF THE STATE OF NEW YORK,
Petitioners-Appellants.

ROBERT P. BEYER,
Counsel for Petitioners.

No. 304

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Bankrupt,
Respondent.

MOTION FOR CERTIORARI, PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JOHN J. BENNETT, JR.,
Attorney General,
Albany, N. Y.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,
against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Bankrupt,
Respondent.

MOTION FOR CERTIORARI.

Comes, now, the petitioners, The People of the State of New York, with Robert P. Beyer, Esq., as counsel, and moves this Honorable Court that it will by certiorari or other proper process directed to the Honorable Circuit Court of Appeals for the Second Circuit, requiring said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending entitled "In the Matter of Experimenter Publishing Co., Inc., Bankrupt, The People of the State of New York, Appellant, Irving Trust Company, as Trustee in Bankruptcy, Appellee" and to that end your petitioners now tender herewith their petition and brief, with a certified copy of the record in said Circuit Court of Appeals.

ROBERT P. BEYER,
Attorney for Petitioner,
Office and Post Office Address,
80 Center Street,
New York City, N. Y.

Petition.

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Bankrupt,
Respondent.

To the Honorable Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioners, The People of the State of New York, respectfully show to this Honorable Court:

First: That there is pending in the District Court of the United States for the Southern District of New York a certain bankruptcy proceeding entitled "In the Matter of Experimenter Publishing Co., Inc., Bankrupt," the bankrupt having been thus adjudicated March 6th, 1929. The proceedings were referred generally to Peter B. Olney, Jr., referee in bankruptcy of said District Court. The respondent, Irving Trust Company, was duly selected trustee of said bankrupt.

Second: Franchise taxes for the tax years beginning November, 1927, and November, 1928, based on reports filed for or on behalf of the bankrupt with the New York State Tax Department were duly assessed on behalf of the petitioner, with respect to which there is no question presented to this Court.

Section 219-d of the Tax Law of the State of New York provides:

> "If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by the commissioner of internal revenue or other competent officer of the United States, *or other competent authority,* such corporation, within ten days after the receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income and shall concede the accuracy of such determination or state wherein it is erroneous."

The section then provides for a reaudit of the tax, and concludes:

> "If from such reassessment it appears that an additional tax is due from such corporation for such year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen b of this chapter, pay such tax."

THIRD: Under interpreting decisions of the Court of Appeals of the State of New York (Engelhardt vs. Alvine Realty Company, Inc., 248 N. Y. 374; Carey vs. Keith, Inc., 250 N. Y. 216) such possible increased tax liability, by reason of an occurring increased assessment on income by the Federal government, is a lien on the property of the corporation as of the date when the tax should have been paid, although subject to subsequent ascertainment as to amount.

FOURTH: On July 1, 1929, the referee, on a petition of the trustee, made an *ex parte* order directing the State of New York to file, within sixty days after service of a copy of said order, with notice of entry, proof of any and all claims which the State of New York might have against the estate of the bankrupt or be forever barred from asserting any such claim either against the bankrupt's estate, against the trustee or the funds in the hands of the trustee. A copy

of the order, with notice of entry, was served on the State Tax Commission on July 18th, 1929.

FIFTH: On October 20th, 1929, the State of New York filed with the referee in bankruptcy, a notice of an unliquidated claim for additional franchise taxes as follows:

"UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter of EXPERIMENTER PUBLISHING CO., INC.	*Bankruptcy No. 46582.* *Peter B. Olney, Jr., Referee,* *7 Dey Street,* *New York, N. Y.*

PLEASE TAKE NOTICE that the State of New York has an unliquidated claim for franchise taxes against the above named bankrupt for the tax years beginning November 1st, 1928, also additional franchise taxes as imposed by Section 219 D, Article 9 a, of the Tax Law, for tax years beginning November 1st, 1917, to 1928, inclusive, together with interest, the exact amount of such taxes and interest being unknown at the date hereof. Claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes.

PLEASE TAKE NOTICE that annexed hereto is a Notice of Unliquidated Claim for Franchise Taxes due the State of New York, and for which the State of New York claims a preference over and above all the debts of the said bankrupt and claims submitted to you.

Dated, 10/17/29.

HAMILTON WARD,
Attorney General of the State of New York.

Filed October 20th, 1929."

No objection at the time was made to the filing of the claim.

SIXTH: This claim was filed because an examination of the schedules, made by Charles W. Hutchins, Corporation Tax Examiner, disclosed that the United States Government had filed claims for additional taxes based on a net income greater than as reported by the corporation.

SEVENTH: On the date of filing of said claim no distribution of the bankrupt's estate had been made. Final distribution has not been made to date. The trustee has sufficient assets to pay the taxes due the State of New York, should a proper reaudit disclose liability therefor.

EIGHTH: The trustee did not move to expunge the claim until March 30th, 1931. A motion to expunge was made returnable before the referee on April 9th, 1931. In the determination of the referee, no exception was taken to the claim as such. In fact the referee in his opinion stated:

> "The Bankruptcy Act contemplates the filing of unliquidated claims and the process for their liquidation in such manner as the court shall direct and thereafter for their proof and allowance against the bankrupt estate. Section 63 B."

The motion to expunge was granted on the sole ground that the claim was filed after the limitation of time prescribed by the bar order. The referee held that the claim should have been filed prior to September 16th, 1929, the date fixed in the bar order.

NINTH: On petition for review, District Judge Coleman affirmed the referee's determination, on the sole ground that the same was filed one month and four days after the time limited by the bar order.

TENTH: The petitioners duly appealed to the United States Circuit Court of Appeals for the Second Circuit, which said Court affirmed the order expunging said claim of the petitioners by decision rendered May 23rd, 1932. Thereafter and on or about the 23rd day of June, 1932, a mandate of the said Circuit Court of Appeals was duly filed in the District Court of the United States for the Southern District of New York.

ELEVENTH: That the petitioners are not in a position to file any actual claim for any additional tax liability until after proper reaudit by the referee in bankruptcy for additional tax liability owing to the Federal Government, based upon a determination of the correct income of the bankrupt for the tax years in question. The allowance of additional taxes to the Federal Government will also result in establishing additional tax liability to the State of New York.

TWELFTH: The State of New York is sought to be precluded from the filing of its claim by a so-called Bar Order, requiring the State to file any claim which it has against the estate in bankruptcy within sixty days from the date of service of said order or be thereafter precluded from the filing of such claim. Such order was not made pursuant to any statutory authority, but solely as a result of a practice rule in bankruptcy cases. The power and authority of a referee in bankruptcy to make such an order has never been passed upon by this Court. Likewise, this Court has never passed on the power and authority of a referee in bankruptcy of the District Court to preclude a sovereign state from filing a tax claim after the expiration of the time limited in said Bar Order, even though there remains in the hands of the Trustee undistributed assets

more than sufficient to pay the asserted tax claim, if and when established.

THIRTEENTH: The proper determination of the question presented is of paramount public importance, involving not only the determination of the question whether the sovereign power of the State can be thus constitutionally limited, but also whether the sovereign State can be thus arbitrarily precluded from establishing its claim through the prescribed statutory procedure in cases where there are sufficient assets remaining undistributed to pay such tax liability when established. The questions involved will recur for determination in innumerable future bankruptcies. The final determination thereof by this Court is not only of paramount public importance to the tax system of the State of New York but likewise to every other state having tax statutes similar to that of your petitioner State.

FOURTEENTH: The following are the questions which, it is respectfully submitted, should receive finality of adjudication:

Question No. 1—Has the United States District Court or a referee in bankruptcy the constitutional power and authority to make an order in a bankruptcy proceeding requiring a sovereign state to file tax claims with the referee in bankruptcy within a prescribed definite period or be thereafter barred from filing any such claims?

Question No. 2—Where a referee in bankruptcy makes an order requiring a state to file any tax claim within sixty days after the service of a copy of said order, and where the State files a claim for additional taxes one month and four days after the expiration of the time limited by said order, which said claim was permitted to remain on file with the referee for a period of one year and five

months from the date of filing before any motion was made to expunge the same because not filed in time, has the referee in bankruptcy the constitutional right and authority to grant a motion to expunge said claim because not filed within the time prescribed in said order in a case where there are sufficient undistributed assets of said bankrupt to pay the said claim in full, upon the same being established as to amount by the referee in bankruptcy.

Question No. 3—In a case where a referee in bankruptcy makes an order requiring a state to file any tax claim within a period of sixty days from the date of service of said order; where the state files a claim for possible increased franchise taxes, determinable as to amount on a reaudit of income for the tax years in question made in connection with the claims for additional tax liabilities for the same year filed by the United States Government, said claim being filed by the State one month and four days after the expiration of the time limited by said order; where said claim is permitted to remain on file with the referee in bankruptcy for a period of one year and five months before any motion is made to expunge same, has the referee in bankruptcy the constitutional power and authority to grant a motion to expunge said claim because not filed within the period prescribed in said order, without making a determination as to the amount of income earned by the bankrupt in the tax years in question in connection with additional tax claims filed by the United States Government, and without, by this method, determining the true amount of taxes due by the bankrupt to the State, in a case where there are undistributed assets of the bankrupt more than sufficient to pay such tax liability as thus adjudicated to the State in full?

FIFTEENTH: The questions stated should each be answered in the negative in order that the sovereignty of the State, as interpreted by this Court in Marshall vs. State of New York, 254 U. S. 380, may be maintained and preserved.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the said cause therein entitled "In the Matter of Experimenter Publishing Co., Inc., bankrupt, The People of the State of New York, appellant, Irving Trust Company, as trustee in bankruptcy, respondent", to the end that said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to establish a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes", approved March 3rd, 1891 (26 Stat. 826, Chap. 517), and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said act, and that the decree of the United States Circuit Court of Appeals for the Second Circuit in said cause and of the District Court of the United States for the Southern District of New York, and each and every part thereof may be reversed by this Honorable Court and the Referee in Bankruptcy herein be instructed and ordered to receive and file

the unliquidated claim of the State of New York expunged by the orders objected to.

And your petitioners will ever pray.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners.
By JOHN J. BENNETT, JR.,
Attorney General of the State of New York.

ROBERT P. BEYER,
Counsel for Petitioners,
80 Center Street,
New York City, N. Y.

State of New York, }
City of New York, } ss.:
County of New York. }

ROBERT P. BEYER, being duly sworn, deposes and says: That he is Deputy Assistant Attorney General of the State of New York and is counsel for the petitioners herein. That he has prepared the foregoing petition and that the allegations therein are true as he verily believes.

ROBERT P. BEYER.

Sworn and subscribed before me this
10th day of August, 1932.
Henry Unterweiser,
Notary Public, Bronx County.
Bronx Co. Clk's No. 1, Reg. No.
N. Y. Co. Clk's No. 8, Reg. No. 4U7.
Kings Co. Clk's No. 7, Reg. No. 4002.
Queens Co. Clk's No. 602, Reg. No. 2827.
Commission expires March 30th, 1934.

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Bankrupt,

Respondent.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioners, The People of the State of New York, petition this Honorable Court to review by certiorari an order of the Circuit Court of Appeals for the Second Circuit made final under Section 7 of an Act of Congress entitled "An Act to Establish a Circuit Court of Appeals, and to review and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes", approved March 3rd, 1891 (26 Stat. 826, Chap. 517).

This case involves important questions effecting State sovereignty and the power and authority of a District Court of the United States to limit such sovereignty by court rule. The questions are stated at length in the petition. They have not received finality of adjudication by this Court. Such finality of determination is not only of paramount importance in the proper administration of the bankruptcy law but to the several states in the administration of their respective taxing systems.

The determination of the Courts below are further in conflict with decisions of this Court and federal courts of other circuits.

The petitioners contend that the order of the Circuit Court of Appeals is erroneous in failing to recognize and apply the following well established principles duly interpreted by this Court and Circuit Courts of other circuits:

(1) A Federal Court cannot divest a State of its sovereign tax functions by means of a Court rule not based on statutory authorization.

(2) No State can be barred, by any Court rule, from asserting a tax liability due it from a bankrupt prior to final distribution of the estate.

(3) No State can be barred by any Court rule from filing a claim with a referee in bankruptcy for a possible increased tax obligation, the law making it the duty of the referee in bankruptcy to make an audit from which such liability may be properly determined.

POINT I.

The judicial requirement to the state to file a claim for taxes within a specified period or be thereafter barred from filing such claim is an unconstitutional infringement of state sovereignty.

Sovereignty of states is described in 36 Cyc. 928 as follows:

> "Prior to the formation of the federal constitution, the states were sovereigns in the full absolute sense of the term; but, under the constitution, their sovereignty stops short of nationality, and their political status at home and abroad is that of states of the United States.—The states are sovereigns within their separate spheres as to all powers not delegated to the United States or prohibited to the states, and, subject to these restrictions, each state is supreme and pos-

sesses exclusive right of regulating its own affairs, and in all matters relating to the life, liberty and property of citizens the state is sovereign as long as it does not conflict with the federal constitution.

Thus, except as restrained by the federal constitution, states may—exercise the taxing power or, in general, may exercise any power possessed by them prior to the adoption of the constitution unless the exercise of such power is expressly or by necessary implication prohibited by the constitution and interferes with the exercise of some power delegated to the United States."

As well stated in Lowenstein vs. Evans, 69 Fed. 908, 911:

"The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union."

As applicable to the state sovereign right of taxation, specific reference is made to the able and elaborate opinion of Chief Justice Marshall in Gibbons vs. Ogden, 22 U. S. 1 and to the following quoted extract therefrom:

"The grant of power to levy and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states."

And, as stated in State Treasurer vs. Wright, 28 Ill. 509:

"The jurisdiction of the State on the subject of taxation for State purposes is supreme and the government of the United States can have no power or control in this regard."

In accord, see Frick vs. Pennsylvania, 268 U. S. 473, 499; Baltimore vs. Gill, 50 Md. 377; Catlin vs. Hull, 21 Vt. 152; Whiteaker vs. Haley, 2 Ore. 128; Stein vs. Mobile, 17 Ala. 234; Curry vs. Wilson, 57 Wash. 367; U. S. vs. Douglas, 3 Wyo. 287.

Such prerogative right has been frequently recognized and enforced.

In Marshall vs. State of New York, 254 U. S. 380, wherein this Court directed the payment of a claim for taxes as a preferred debt, Mr. Justice Brandeis, for a unanimous Court, stated:

> "This priority arose and existed independently of any statute. The legislature has never, in terms, limited its scope; and the Courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority. The only changes of the right made by statute have been by way of enlarging its scope in certain cases."

In the case of United States vs. Birmingham Trust & Savings Co., 258 Fed. 562, the Circuit Court of Appeals for the Fifth Circuit speaks as follows, respecting the federal sovereignty for the collection of taxes:

> "The right of the United States to present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed cannot be questioned."

This right is of equal dignity to that of the State right. The quotation applies in all its vigor to the instant case. (See also *In re* Brezin, 297 Fed. 300.)

In Lewis vs. United States, 92 U. S. 618, this Court held that the Federal Government was not bound by the bankruptcy statute applicable to the limitation of filing of

ordinary claims and that it was the duty of the trustee in bankruptcy to ascertain and have paid any taxes that may be due and owing.

The sovereign right is aptly referred to by the Circuit Court of Appeals for the Third Circuit in Wechsler vs. United States, 27 Fed. 2nd 850, as follows:

> "The government is not bound to go into the bankruptcy Court, and its debts is not barred by a discharge in bankruptcy, but in order to secure a priority of payment out of a composition fund, the claim must be filed in the Court. Failure to do so, with full knowledge of the composition proceedings, before the fund is entirely distributed, waives such right, and leaves no ground on which to hold the trustee, or any person appointed to distribute the fund, liable out of his private estate; but having filed its claim before the composition fund is exhausted, the claims, if allowed, may now be paid out of this fund to the extent of the undistributed balance."

Bar orders or orders of foreclosure are therefore limited in effect, to insure safety of distribution. In this regard they are like the early orders of the same kind in the administration of a decedent's estate. (Gillespie vs. Alexander, 3 Russell, 130, 136.) If the federal government or the state is served with a bar order, and fails to file its proof of claim, and thereafter distribution is made, while the sovereign right itself is not destroyed, there will be construed to have occurred a waiver of such right as to the assets distributed under the order of the Court. But as to undistributed assets existing at the time the claim is filed, the sovereign right attaches and cannot be constitutionally judicially affected.

The foregoing result accords with sound principle.

A sovereign State, in enforcing its obligations, is bound by no statute of limitations, unless expressly in-

cluded by explicit statutory language. (U. S. vs. Corona Coal Co., 264 U. S. 578; Grand Trunk Western Railroad Company vs. U. S. 252 U. S. 112; Chesapeake etc. Canal Co. vs. U. S., 250 U. S. 250; People vs. Clarke, 9 N. Y. 349.) The doctrine of laches does not apply to any action by the State to enforce or preserve the public revenue. (Terra Haute etc. R. R. Co. vs. The State, 159 Ind. 438; Josselyn vs. The State, 28 Miss. 758; Haehnton vs. Corn, 13 Pa. St. 617; State vs. Columbia, 52 S. W. Tenn. 511; State vs. Sponagle, 45 W. Va. 415; *Re* Mosley, 100 Kans. 495; State vs. Lumber Co., 122 Minn. 400.) With the State being in a position, therefore, to present its claim for taxes at any time without limitation or without being guilty of laches, it would, of course, render distribution of a bankrupt's estate impossible unless a limitation was prescribed at the end of which time the Court could imply a waiver in connection with a distribution of the estate. The practice of issuing bar orders was only intended to accomplish this result. In no other respects was it intended to affect, nor could it constitutionally affect, the sovereign right of the State to collect the public revenue. If the State does not file its claim before the expiration of the time limit in the bar order, a waiver may be implied unless the State files and brings the same to the attention of the Court before actual distribution of the estate. For any prior laches or delay of its officers, the State remains unaffected.

No estoppel could arise against the State. The elements of an estoppel are, of course, that one person, by his conduct, has induced another to believe in the existence of a particular state of facts on which action is taken to the latter's prejudice. But the State, in the instant case, made no representations as to the existence or non-existence of any tax liability. Inquiry by the trustee would have dis-

closed the possibility of the accrual of the tax liability for which the claim was filed. There has been no prejudice to anybody. No final distribution of the estate has been made. There has been no reliance upon the silence of the State which has resulted in any action prejudicial to any interest. *The estate is in the same condition as it would have been had the State filed its claim within the limitation of time prescribed by the bar order.* Therefore, the elements of an estoppel are entirely lacking.

POINT II.

In the absence of payment of final dividend on the estate of the bankrupt, the unliquidated claim of the State of New York for additional franchise taxes must be allowed, even though filed after the expiration of the time limitation prescribed in the bar order.

The period of time prescribed in the bar order for the filing of any claims for taxes by the State of New York was sixty days after the service of a copy of said order. This time expired September 16th, 1929. The claim in question was filed by the State with the Referee October 20th, 1929, one month and two days after the expiration of said time limitation. At that time the claim was received by the Referee and placed on file. No final distribution of the bankrupt's estate had then been made and it cannot be contended that the late filing of the claim has resulted in any prejudice. The motion of the trustee in bankruptcy to expunge the claim was made in April, 1931, a year and a half after the claim was filed and apparently allowed for consideration on the merits.

In expunging the claim on the ground that the same was filed after the expiration of the time limitation pre-

scribed by the bar order,—an order issued not under any statutory authority but solely under a Court rule to permit the final accounting and distribution in bankrupt estates,—both the Court below and the referee fell into error in failing to take the fact into account that the liability to pay taxes to a sovereign State continues after the appointment of either a receiver or trustee until the period of actual distribution. (State of New Jersey vs. Anderson, 203 U. S. 483.) As stated in Prince vs. Walters, 131 Fed. 546, 550:

> "But the bankruptcy act does not withdraw the estates of bankrupts from the reach of the taxing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of trustees, the same as if they were not. (Swarts vs. Hammer, 120 Fed. 256, affirmed 194 U. S. 441; City of Waco vs. Bryan, 127 Fed. 79; *In re* Sims, 118 Fed. 356; *In re* Conhaim, 100 Fed. 268; *In re* Keller, 109 Fed. 131.) Even though accruing after bankruptcy, they must be regarded as within the meaning of the statute and entitled to priority, the same as those which antedated it. They are equally important to the municipalities to which they are due whenever assessed, and the obligation of the property to respond is logically no different or greater at the one time than at the other."

The reason for the rule is particularly pertinent in a case like the present where the object of the claim is to have the referee determine the correct amount which the corporation should pay to the State for its previous enjoyment of corporate life. The continuance of such life is the result of the gift of the State, which permits such continuance in consideration of a fixed annual charge of franchise tax, based first upon the reports of net income filed by the corporation, and subject to subsequent increase upon such income being increased by the Federal

Government in the returns of the corporation filed with the latter. As stated in New Jersey vs. Anderson, 203 U. S. 483:

> "The State which created this corporation had the right to fix the terms of its existence, and provide, if it saw fit so to do, that for the continued existence of its franchise, the corporation should pay the annual sums to the State, fixed by the amount of its yearly outstanding capital stock."

The same conception of continuous annual liability during the life of the corporation is the nucleus of the decision in People vs. Jersawit, 263 U. S. 493.

The legal effect of the bar order was simply and solely to permit a distribution, partial or entire, to be made of the bankrupt's estate, with a release of possible tax liability claim for which claim had not been filed before such distribution is affected. And in previous decisions, in which this subject received consideration, bar orders have been limited accordingly.

Employers Liability Assurance Corporation vs. Astoria Mahogany Co., 6 Fed. 2nd 945, was a decision by this Court, where a creditor was permitted to file a claim after the expiration of a time limitation in a bar order, where the only thing that could be said in opposition, as in the instant case, that the allowance of such claim would swell the total amount of the filed claims, the intent of the order being to prevent prejudice in any administration of the bankrupt's estate made without knowledge of the possible existence of the claim. (In accord, *Re* Coulter, 206 Fed. 906; *Re* Bell Piano Co., 155 Fed. 272.)

In People vs. Hopkins, 18 Fed. 2nd 731, the Court held that the limitation of a bar order did not preclude the

State from subsequently filing a claim for taxes, providing, at that time, no distribution of the bankrupt's estate had been made. Judge Swan, writing the opinion of this Court, stated, page 732:

> "The effect of such so-called bar order is merely to protect the receiver in making distribution without regard to possible claims of creditors who have failed to file them. If, before distribution is actually made, a creditor appears and satisfies the Court that he is justly entitled to share in the assets on hand, his delay in presenting the claim should not bar him unless some one has been injuriously mislead thereby. * * * Particularly should this be true with respect to taxes. The assets are still *in custodia legis* and should bear their share of the public dues despite the state's delay in asserting its claim."

The Court then further held that a motion to compel the referee to receive the state's claim for taxes must be granted, even though the state had been specifically ordered to present any claim which it had for taxes within a specified time, Judge Swan further stating, page 733:

> "The assets still remain in the hands of the receiver. Had a motion to vacate been made, we think it should have been granted, and it seems to us immaterial that the state presented its claim by an independent application instead of by motion to vacate."

In Re Anderson, 279 Fed. 525, relied on by respondent, a proceeding in bankruptcy, the Court simply held that the United States could not stand by after permission having been granted to file its claim and expect to subsequently collect its claim from the bankrupt or his trustee. To permit such a proceeding would make it impossible to say when there would be a winding up of the bankruptcy proceeding and a distribution of the assets. This is good law and the proper rule for the management of estates; but

the facts in the Anderson case are not the same and do not apply to the proceeding herein.

In the Anderson case, notice was given to the Collector to file the claim of the United States or to be forever barred, and notwithstanding such notice, the United States neglected or, in any event, failed to pay heed to the mandate of the Court to file its claim and simply took the position that the referee and the Court were without power to grant an order barring the sovereign, which is entirely different from the attitude of the State of New York in the proceeding herein.

The State of New York has filed no formal proof of claim in a definite amount for the good and sufficient reason that it is not in a position so to do at this time, as aforesaid, and the notice of claim filed herein is only for the purpose of advising the trustee of such possible claim, in order that he might assist and cooperate to the end that all taxes legally due and owing shall be paid.

Consequently, the bar order in this case is really barring taxes that have not actually accrued or been levied and surely it is not within the province of a bar order to bar future taxes that may or may not accrue.

In Re BATES MACHINE & TRACTOR CO., 8 Fed. 2nd, 424, in which case the facts are somewhat similar to the present case under review, Judge Wilkerson, speaking of the Anderson case, said:

> "There a tax had been levied more than two years prior to the filing of the petition by the trustee, and the trustee claimed that the tax had not been properly laid. The United States never filed any proof of claim, and the entry of the order was necessary to the

exercise by the Court of its power under §64-A of the Bankruptcy Act (Comp. St. §9648). The estate cannot be closed until the validity of the tax which had been levied was determined. Here the additional tax was not levied until after the time fixed in the order of April 12, 1924, had expired, and the tax was levied and the claim was filed long before the time for the declaration of the final dividend under §65-B (Comp. St. §9649) had expired.

We are not dealing here with the power of the Bankruptcy Court to require the United States to bring forward claims based on taxes actually levied for the purpose of having questions relating to such claims adjudicated in the Bankruptcy Court. We are dealing with the power of the referee, acting under §64-A, to cut off the United States as to additional taxes levied pursuant to the Revenue Laws after a specified time, and to deprive the United States of its right to have such taxes paid out of any funds which may remain in the possession of the trustee. It must be borne in mind that in many cases, the basis for the additional levy is not disclosed until after the books and papers of the bankrupt have come into the possession of the trustee. The exercise of the power here asserted by the referee would operate, in many cases, to prevent the United States from recovering revenue out of which it has been defrauded by a false return. It must be borne in mind that the claims of the United States for taxes are not affected by a discharge in bankruptcy. They are not debts, but imposts levied for the support of the government. The government's claim is in the nature of an equitable lien, and follows the property into the hands of the trustee in bankruptcy, where it awaits satisfaction. *Re-Brezin,* (D. C.) 297 F. 300, 306.

The question of the rights of the United States in cases where it fails to assess the tax until after the funds in the hands of the trustee have been paid out under §65-B is not involved here. We are dealing with the power of the referee to enter the general order barring the United States, and with the right of the United States to file its claim for the additional taxes, and to have them paid out of whatever funds remain in the hands of the trustee.

It is my opinion that §64-A does not confer upon the referee power, express or implied, to make the order of April 12, 1924, and that the order, when applied to the claim for the additional taxes for 1919 and 1920, is void. It is my opinion, further, that the claim of the United States filed June 14, 1924, was properly filed, and that it should be heard by the referee on its merits. * * * * * * * * The Bankruptcy Court and the trustee, of course, have a duty to perform to creditors. They owe a duty also to the United States. That duty is one of cooperation and assistance in the collection of taxes levied for the support of the government. The statute casts that duty upon the trustee in no uncertain terms."

In the case of *Villere v. United States, in re John P. Rausch Co. Inc.*, 18 Fed. 2nd 409, speaking of the Anderson case, *supra*, the opinion states:

"The case of *In Re* Anderson, 279 Fed. 525, relied upon by the appellant does not attempt to hold contrary to the general rule. * * * * * * It is not applicable to the instant case, as the government is not seeking to reopen the provisional account, and makes no claim to the assets previously distributed."

In Re Brezin, *et al.*, 297 Fed. 300, Runyan, District Judge:

"The Anderson Case, while seeming to hold to the contrary, really goes no further than to rule that the government cannot, after notice indefinitely refuse to present its claim. * * * * * * The departure in public policy noted consists in giving the federal courts jurisdiction as to the amount or legality of any tax, and apparently putting the United States on a par with other taxing divisions. Section 64-A expressly recognizes priority *and is silent as to any limitation of time, simply making it mandatory that the Courts shall order the payment of taxes in advance of payments to creditors.*"

POINT III.

It is the duty of the Referee to allow the State's claim in accordance with a reaudit of income taxes due the Federal Government.

The bankrupt made a report of income for the tax years beginning November 1st, 1917 to 1928 inclusive. Taxes were levied in accordance with the returns thus filed, with respect to which there is no question on this appeal. But under Section 219-d of the Tax Law of the State of New York, the federal final adjustment of income is taken as the basis of the correct franchise tax payable to the State. The unliquidated claim of the State is in effect merely a caution or advice of a possible further claim for franchise taxes dependent upon the ascertainment of additional taxable income as determined in the matter of taxes due the federal government. The state cannot do anything further but to file the claim until the claim of the federal government is determined in this proceeding.

The referee has the legal right to determine the correct amount of net income for the tax years and audit and readjust the claims of the federal government.

In 1929 the State had, in effect, stated to the referee, that it had made franchise tax assessments which were subject to possible increase dependant upon what action was taken with respect to federal income taxes. Thereupon it became the duty of the referee to fix and determine the true net income for the tax years in question and determine the extent of the claim of the national government. When this was done, the claim of the State became necessarily fixed and determined.

Nothing the State did or could do after the filing of the unliquidated claim delayed the closing of this estate. The referee had the power to and should determine the federal government claims. No reason is advanced why this had not been done long ago. Had it been, the claim of the State would have also been liquidated, settled and determined. For what the trustee or referee has neglected to cause to be done, neither the State nor any of its officers or departments can be said to be responsible. The State's claim had been permitted to remain on file for upward of a year and a half before the trustee moved to expunge it because it had been so filed a little over a month after the time limited in the order, at which time final administration of the estate was far from completion.

The Bankruptcy Act places a responsibility upon the trustee when it directs him to pay all taxes legally due and owing and that mandate does not mean simply to petition the Court for bar orders, but rather means that it is the duty of the trustee to use every means at hand to search out from books and records of the bankrupt or its successors in interest, and from such books and records to ascertain and make known to the taxing authorities information that will enable the taxing authorities to file proper proof of claim, to the end that all taxes will be paid. This, the trustee has not done in this case, as will be disclosed from a reading of the correspondence offered in evidence herein. On the contrary, it appears to be the attitude of the trustee to do nothing to aid the State of New York in obtaining sufficient facts and figures to determine what taxes and their amounts, if any are due. And while it is perfectly proper and equitable that bar orders be used for the purpose of protecting the trustee and preventing unnecessary delays in the winding up of the affairs of the estate, or to

prevent any injustice to other persons or creditors, there must be no abuse in the use of such bar orders and extreme caution and care should be taken before foreclosing the rights of the sovereign in the collection of its taxes.

There is nothing in the Bankruptcy Act * * * which exempts property in the hands of a trustee in bankruptcy from the State and Municipal taxes to which similar property in the same locality is subject.

By Section 7 of that Act, the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee *no mysterious or peculiar ownership* or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and Municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. *(Swartz v. Hammer,* 194 U. S. 441.)

> "Orders of foreclosure are primarily intended for no more than safety in distribution. In this regard they are like the early orders of the same kind of the English Court of Chancery in the administration of a decedent's estate. *Gillespi v. Alexander B. Russell,* 130, 136. They enable the receivers to dispose of the property, *but not to forfeit the rights even of dilatory creditors.* That delay may be enough we do not deny, but certainly not unless the result of allowing the claim is to destroy intermediate interests, arising on the faith of creditors' inaction." * * * * "nor can we see that the appellant was under any duty to advise the receivers upon the first intimation in August, 1922

that it might have a claim. The transactions were manifold, and complicated; first suspicions might prove groundless." *Employers Liability Assurance Corporation, Ltd. v. Astoria Mahogany Co., Inc.*, 6 Fed. 2nd 945.

"It is the duty of the trustee to search for taxes and pay those which are legal. Section 64-A of the Bankruptcy Act. Consequently claims for taxes need not be verified and no formal proof of claim is required." *In re: DeAngeles*, 36 Fed. 2nd 218; *Standard v. Dayton*, 220 Fed. 441.

"Back taxes are to be paid, even though they absorb all or a great part, of the assets; and even though the tax collectors have been neglectful in making collection." *In Re: Weissman*, 24 A. B. R. 150, 178 Fed. 115.

City of Dallas v. Menezes, 16 Fed. 2nd 779 (C. C. A.) holding the trustee personally liable if a refund could not be obtained from the creditors to whom the estate had been distributed.

In Re Chandler Motors of New England, Inc., 17 Fed. 2nd 998, Morton, District Judge, held:

"It is the duty of the trustee under Bankruptcy Act, §64-A (Comp. St. §9648) to pay all taxes legally due upon their being called to his attention. The trustee contends that the running of the statute, not merely prevented the government from taking legal steps to collect the tax, but extinguished its right to the tax —an old question of theoretical law, about which, in different forms, there has been much discussion, which I do not propose to extend. The trustee holds the estate in trust for various purposes, one of them being to pay lawful taxes. No proceedings by the government with respect to this tax was required, except such as might be necessary in order to fix the proper amount of it. Under such circumstances, the government's right to the tax was clearly not lost by the failure to file proof of claim."

With the duty of the trustee thus well defined, with the referee having power to make an adjudication, at the instance of the trustee, which would be decisive of the entire situation, the responsibility of not having both the claims of the federal government and the State settled and determined is not that of the State.

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be granted as prayed for.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1932.

No. 304.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC.,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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LODER PRINTING CO., INC., 63 Duane St., N. Y. C., WORTH 2-0689

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Supreme Court of the United States

OCTOBER TERM—1932.

THE PEOPLE OF THE STATE OF NEW YORK, Petitioners, AGAINST IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Respondent.	No. 304.

Brief in Opposition to Petition for Writ of Certiorari.

I.

The opinions of the Courts below (omitted from Petitioner's Brief).

The petitioner's brief fails to comply with the provisions of Rule 27, subdivision 2(b), of the Rules of this Court which require the petitioner's brief to contain a reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported. The information thus omitted by the petitioner will be furnished by the respondent:

The opinion of the Referee has not been reported. It appears in the printed record (R., 101).

The opinion of the United States District Court, Southern District of New York (Hon. Frank J. Cole-

man, District Judge) has not been reported. It appears in the printed record (R., 110).

The opinion of the United States Circuit Court of Appeals, Second Circuit, is reported in 58 Fed. (2d) 980, and is affixed to the printed record (R., following page 118).

II.

Inaccuracies and misleading statements in and omissions from the petition.

The following paragraphs of the petition occasion this criticism:

Paragraph "Second" states that franchise taxes for the tax years beginning November, 1927, and November, 1928, were "duly assessed on behalf of the petitioner, with respect to which there is no question presented to this Court." The record contains no evidence that such franchise taxes were "duly assessed." The record is concerned only with a certain "notice of an unliquidated claim for franchise taxes" against the bankrupt for the tax years beginning November 1, 1928, and additional franchise taxes for tax years beginning November 1, 1917, to 1918 inclusive.

Paragraph "Sixth" fails to disclose that Charles W. Hutchins is an employee of the State Tax Commission of the State of New York (R., 39).

Paragraph "Seventh" states that "on the date of filing of said claim, no distribution of the bankrupt's estate had been made", that "Final distribution has not been made to date" and that "The trustee has sufficient assets to pay the taxes due the State of New York, should a proper reaudit disclose liability therefor." The paper referred to as "said claim" is not a notice of claim but a "notice of an unliquidated claim for

additional franchise taxes," which notice contains a statement that "*claim will be filed* as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes." There is no basis in the record for the statement that the Trustee has sufficient assets to pay the taxes due the State of New York, should a proper reaudit disclose liability therefor. The amount of those unascertained and problematical taxes does not and, being undetermined, could not appear in the record. The petition fails to disclose that the assets in the hands of the Trustee are subject to the payment of attorneys' fees and other miscellaneous administration expenses which, under the rules of the Court, cannot be determined until the closing of the estate. In view of the large amount which the Trustee received for the assets of the bankrupt's estate, under the contract made with the purchaser corporation and approved by the orders of the Court (R., 75, 77) and the important services performed by the attorneys, these various administration expenses will be substantial in amount.

After asserting, without any foundation in the record, that the Trustee has sufficient assets to pay the State's claim, if any, for unascertained and undetermined taxes, the petitioner states in Paragraph "Eleventh" that "the petitioners are not in a position to file any actual claim for any additional tax liability until after proper reaudit by the referee in bankruptcy for additional tax liability owing to the Federal Government, based upon a determination of the correct income of the bankrupt for the tax years in question." Those tax years run from November 1, 1917, to 1928, inclusive, a period of eleven years. The record does not disclose whether or not there is any actual "additional tax liability owing to the Federal Government" and whether

or not any proceedings have been had for the purpose of determining such additional tax liability, if any.

Paragraph "Eighth" states that the Trustee did not move to expunge the "claim" until March 30, 1931. Here again the petitioner erroneously refers to the notice as a claim instead of a notice of an unliquidated claim and of an intention to file a claim. A claim for definitely ascertainable taxes is not an unliquidated claim. The time for the filing of any claim by the State, pursuant to the provisions of the tax bar order, expired on September 16, 1929. The motion to expunge the notice was returnable before the Referee on April 9, 1931. During the interval between September 16, 1929, and April 9, 1931, a period of nearly one year and seven months, no claim was filed by the State, pursuant to the intention to file the claim expressed in the "notice of unliquidated claim." The record is bare of any evidence of any attempt to file a claim. The petition itself, verified August 10, 1932, well over three years after the expiration of the tax bar order, alleges in Paragraph "Eleventh" that the petitioner is not in a position to file any actual claim even at the present time. The State is at sea and does not know whether or not it actually has a claim, although three years and six months have elapsed since the adjudication in bankruptcy.

Paragraph "Eighth" states that in the determination of the Referee no exception was taken to the claim as such. The petition mentions a claim when there was no claim to which any exception could be taken. Not only did the State file the notice in question after the expiration of the statutory six months' period for the filing of claims in bankruptcy and after the expiration of time allowed by the tax bar order, but the paper which the State filed was not in conformity with the

requirements of Section 57 of the Bankruptcy Act which pertains to the form and contents of a proof of claim.

Paragraph "Tenth" states that the United States Circuit Court of Appeals for the Second Circuit affirmed the order of the District Court expunging the "claim" by decision rendered May 23, 1932. The petition fails to advise this Court that the affirmance by the Circuit Court of Appeals was made "without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment" (Opinion of Circuit Court of Appeals affixed to record).

Paragraph "Twelfth" states that the tax bar order was not made "pursuant to any statutory authority". This is not a fact, for the National Bankruptcy Act, Section 2, subdivision 15, provides that the Courts of Bankruptcy are invested with power to "make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of this Act" and the various Circuit Courts of Appeals have uniformly held that tax bar orders are proper and necessary to effect an orderly and expeditious administration of estates in bankruptcy.

Paragraph "Twelfth" states that this Court has never passed on the power and authority of a Referee in bankruptcy to make a tax bar order or to preclude a sovereign State from filing a tax claim after the expiration of the time limited in the tax bar order, even though the Trustee holds "undistributed assets more than sufficient to pay the asserted tax claim, if and when established". The power of the District Court, acting through its Referees, to make tax bar orders has been uniformly recognized by the Circuit Court of

Appeals. It has apparently been the practice of this Court not to clutter its calendars with cases relating to orders made by the Referees, the District Courts and the Circuit Courts of Appeals in bankruptcy cases. Paragraph "Twelfth" again asserts without warrant in the record that the Trustee has on hand funds more than sufficient to pay the amount of an unascertained and undetermined tax claim, if any, for possible additional taxes for a period of eleven years.

Paragraph "Thirteenth" again without foundation in the evidence makes an assertion with regard to "sufficient assets remaining undistributed to pay such tax liability when established".

Paragraph "Thirteenth" states that "the questions involved will recur for determination in innumerable future bankruptcies". That assertion implies that the State of New York will be dilatory and negligent hereafter in filing claims, if any, in compliance with the Bankruptcy Act and the orders of the Court. The assertion is in the field of prophecy and is not based upon any evidence in the record. The National Bankruptcy Act has been in operation since 1898, a period of thirty-four years, during all of which time the State of New York has been levying taxes and doubtless filing timely claims in proper form against estates in bankruptcy. Apparently, during all of these years the State has never had occasion to raise the question raised in the present case. It is hardly probable that the State, if diligent and careful in the preparation and filing of its claims, will be involved hereafter in a situation similar to that which exists in the present case. No question of "paramount public importance to the tax system of the State of New York" and of other States, as the petitioner urges, is involved in this case. It is a simple matter for a State to comply with the provisions of a tax bar order or, if unable to do so within the

sixty days allowed by the order, to apply to the bankruptcy court before the expiration of the order for an extension of time within which to obtain any necessary information and to file a claim against a bankrupt estate. (*Matter of Morgenstern & Co., Bankrupt*, 57 Fed. (2d) 163, (C. C. A. 2nd).)

Question No. 2 in paragraph "Fourteenth" refers to a "claim" instead of a "notice of unliquidated claim" containing a statement of intention to file a claim thereafter, and states that the "claim" "was permitted to remain on file with the Referee for a period of one year and five months from the date of filing before any motion was made to expunge the same because not filed in time". The Court's attention must again be called to the fact that during that period of one year and five months there was on file only the empty and meaningless notice of an unliquidated claim expressing an intention thereafter to file a claim. The Trustee did not permit any actual claim to remain on file with the Referee for the period of one year and five months before moving to expunge such claim because it was not filed within the time provided by the tax bar order. The State made no attempt to file a claim during that long interval and the Trustee's motion to expunge was merely a motion for an order declaring a default which had long since occurred. The State and not the Trustee was guilty of gross laches. Furthermore, Question No. 2 contains the unfounded statement that the Trustee holds "sufficient undistributed assets of said bankrupt to pay the said claim in full, upon the same being established as to amount by the Referee in Bankruptcy". Manifestly, the State, not knowing whether or not it has a claim and not knowing the amount of such claim, if any, is unable to state whether or not the assets in the hands of the Trustee will be sufficient to pay such claim if and when established, the funds in

the hands of the Trustee being subject first to the payment of attorneys' fees and all other administration expenses. There is no evidence in the record of the amount, if any, still in the hands of the Trustee.

Question No. 3 in paragraph "Fourteenth" contains statements similar to those made in Question No. 2 and equally misleading and unfounded.

Paragraph "Third" states that under decisions of the Court of Appeals of the State of New York "such possible increased tax liability * * * is a lien on the property of the corporation as of the date when the tax should have been paid, although subject to subsequent ascertainment as to amount". On page 21 of its brief the State contends that the bar order bars taxes "that have not actually accrued or been levied and surely it is not within the province of a bar order to bar future taxes that may or may not accrue". The State here takes an inconsistent position. The Court of Appeals of the State of New York held that within the State taxes were due though unascertained. The bar order does not bar taxes "that have not actually accrued or been levied". It bars only claims of the State which accrued prior to the adjudication in bankruptcy at or prior to which time the corporation ceased to function as a going concern liable to the payment of franchise taxes.

Paragraph "Fifteenth" states that the questions set forth in paragraph "Fourteenth" should be answered in the negative in order that the sovereignty of the State, as interpreted in *Marshall* v. *State of New York*, 254 U. S. 380, may be maintained and preserved. That case was not a bankruptcy case and had no relation to tax bar orders. It involved an equity receivership and the State's right to priority of payment to its claims over the claims of general creditors.

III.

The National Bankruptcy Act confers broad powers in law and equity on the Courts of Bankruptcy. The making of tax bar orders is one of the powers frequently and necessarily exercised by those Courts. Under the Act a State's claim for taxes has a priority in advance of payment of dividends to creditors and the State must obey the reasonable orders of the Court.

Section 2 of the Bankruptcy Act invests courts of bankruptcy with the power to:

> "(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates";
>
> "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy";
>
> "(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided";
>
> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act";
>
> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Under Section 64 of the National Bankruptcy Act, taxes legally due and owing by a bankrupt "to the United States, state, county, district, or municipality"

are granted certain priorities. This is a special benefit which the Bankruptcy Act confers upon a State, and to obtain that benefit, the State must comply with the orders of the bankruptcy court made pursuant to the general powers conferred upon it by the Act, and among these orders are tax bar orders.

In *In re Wood & Henderson*, 210 U. S. 246, this Court said at page 254:

> "Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

In *United States Fidelity Co.* v. *Bray*, 225 U. S. 205, this Court said at page 217:

> "We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them * * * A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way as are the courts of bankruptcy."

In *Mitchell Store Building Co. v. Carroll*, 193 Fed. 616, appeal dismissed and writ denied in 232 U. S. 379, the Court said:

> "This provision (Section 2 of the Bankruptcy Act) must be given a free interpretation as conveying 'broad powers' upon the bankruptcy court 'to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine otherwise in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy'."

Under the Bankruptcy Act the Referees are invested with, among other powers, the jurisdiction to perform such acts and duties as is conferred on courts of bankruptcy except as to questions arising out of the applications of bankrupts for composition or discharges and except as may otherwise be provided in the Act. (*National Bankruptcy Act, Section* 38.) The Referees have original jurisdiction to issue tax bar orders, and all reported cases relating to such orders are based upon appeals from orders made by the Referees.

The practice of making tax bar orders is sound and well established by the various Circuit Courts of Appeals. Tax bar orders are issued in the interest of all of the creditors of a bankrupt for the purpose of bringing before the Court claims of any sovereign taxing powers so that such claims may be speedily adjudicated and the bankrupt estate liquidated with all possible expedition.

In *In re Anderson*, 279 Fed. 525 (Circuit Court of Appeals, Second Circuit), a Trustee in bankruptcy served a notice of motion for an order directing the United States to file a claim or be barred. The United States appeared specially and moved for a denial of the motion on the ground that the Court was without juris-

diction to make such an order. The Trustee's motion was granted and on appeal the Referee's bar order was affirmed, the Court saying at page 529:

> "The United States must file its claim for taxes as any other creditor, if it desires to share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of Section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter* (D. C.) 131 Fed. 546."

Section 64-a of the Bankruptcy Act relates not only to claims for taxes due to the United States, but also to claims for taxes due to any state, county, district or municipality, and what was said in the *Anderson* case, just cited, applies with equal force to the present case involving, as it does, a possible claim for taxes alleged to be due to a State.

In *In re Stavin*, 12 Fed. (2d) 471, Judge Thacher, now Solicitor General, said with reference to tax bar orders at page 473:

> "But under Section 64-a, taxes legally due and owing by the bankrupt must first be determined and ordered paid. For this purpose the bankruptcy court may by proper notice bring the state and the United States before it to the end that claims for all taxes legally due and owing may be ascertained and their validity determined. In the *Anderson* case, *supra*, this was done by an order similar to the orders here in question. Such orders are proper and clearly within the jurisdiction of the court in the exercise of its power under Section 64a."

In *Matter of Morgenstern & Co., Bankrupt*, 57 Fed. (2d) 163 (Circuit Court of Appeals, Second Circuit), the Court affirmed an order of the District Court confirming an order of a Referee expunging a claim filed by the Collector of Internal Revenue, and the Court said:

> "But, under our construction of Section 64-a of the Bankruptcy Act the bankruptcy court, in aid of speedy administration, might limit the time within which the Government might prove its claim against the estate. If the Commissioner, because of existing exigencies, required more time to make his assessment, application should have been made to the court to modify its order so as to extend the time to file proof of claim. In default of such an extension the order barring claims would protect the trustee in distributions of assets made while it stood. Any other interpretation of its effect would enable the Government to take its time in presenting claims for taxes and would thus destroy the very advantages which orders limiting the time to file tax claims have been designed to prevent."

Surely it could not be seriously contended that under the Bankruptcy Act a State has rights greater than those of the Federal Government. Neither the Federal Government nor any State Government may disregard bar orders with impunity.

IV.

No questions of State sovereignty or of unconstitutional interference with any rights of the State are involved in this case.

There is no dispute by the State in the present case that it failed to comply with the provisions of the tax bar order. It attempts to justify its disobedience of the tax bar order by asserting in the title of Point I of its brief that "The judicial requirement to the State to file a claim for taxes within a specified period or be thereafter barred from filing such claim is an unconstitutional infringement of State sovereignty". Such a contention is manifestly untenable. The State evidently realizes this for there is no reference in its argument to any article or section of the Federal Constitution alleged to have been infringed by the tax bar order. If any right of the State under the Federal Constitution has been infringed by any portion of the Bankruptcy Act or by any order of the bankruptcy court, the specific provision of the Constitution conferring or reserving such right of the State should be indicated in the State's brief.

There is, furthermore, no argument in support of the assertion that the sovereignty of the State has been infringed. The State cites many cases in its brief which did not arise in any Federal Court or in any bankruptcy case and which have no bearing upon or rela-

tion to the question involved in the present case. It is not necessary to recatalogue those cases in this brief with any accompanying arguments distinguishing them from this case. Those cases related to the jurisdiction of the State on the subject of taxation for State purposes and held that the jurisdiction of the State in that respect is supreme. But that jurisdiction lies within the confines of the State itself and is in no way affected by any provision of the Bankruptcy Act or by the tax bar order in question which merely called upon the State to file its claim, if any, in the bankruptcy court within a prescribed time if the State desired to avail itself of the special benefits of priority conferred upon it as a tax creditor by Section 64 of the Bankruptcy Act.

The Trustee does not question the right of the State to levy and collect taxes under its laws and its right to a priority as a creditor in bankruptcy when its claim is properly filed. A State is a sovereign within its own walls. To some extent its powers are controlled by the Federal Constitution and by statutes adopted pursuant to the powers reserved to the Federal Government by the Constitution. The National Bankruptcy Act was enacted pursuant to special Constitutional sanction, and sovereigns and citizens alike, who, as creditors, desire to participate in the distribution of a bankrupt estate, must comply with the Federal statutes and the orders of the Federal courts relating to the administration of a bankrupt estate.

In the present case the State admits (State's brief, page 16) that distribution of a bankrupt's estate would be rendered impossible unless a limitation should be prescribed for the filing of a claim by the State for taxes, at the end of which time the Court could imply a waiver in connection with the distribution of the estate. The State admits (State's brief, page 16) that "The practice of issuing bar orders was only intended

to accomplish this result." The State thus admits that the issuance of a tax bar order in bankruptcy is both necessary and proper.

Tax bar orders, under the Bankruptcy Act, do not in any way involve questions of State sovereignty. If the State cannot be barred by the bankruptcy court from filing a claim unless filed within a specified reasonable period, then the State may ignore the entire Bankruptcy Act and may sue a bankrupt upon a claim for franchise taxes in a State Court and levy upon the bankrupt's personal property in the hands of the Trustee in complete and total disregard of the rights of other creditors, including the Federal Government itself, under the Bankruptcy Act. The Bankruptcy Act was enacted pursuant to the power conferred upon Congress by Article I, Section 8, of the Federal Constitution and is binding upon all citizens and sovereigns, including the Federal Government itself, as are all orders of the court made pursuant to powers conferred by the Act.

V.

The decision of the Circuit Court of Appeals has not finally precluded the State from filing a claim.

All possible rights of the State have been safeguarded by the decision of the Circuit Court of Appeals which, in spite of the State's default under the tax bar order, nevertheless gives to the State the right to make "an application presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment" (Opinion of Circuit Court of Appeals).

When the State filed the notice in question on October 20, 1929, the State was already in default under the terms of the tax bar order. The Trustee's motion to expunge the notice was unnecessary for the State had already been barred. The Trustee's motion was made, however, for the purpose of having an order made of record declaring and establishing the default. Such a motion could be made by the Trustee at any time after the default had occurred. The order of the Referee is virtually a judgment by default and instead of appealing from that order, as the State has done, the State should have moved to open its default upon proper papers and upon good grounds, if any it had. Although the State has thus far failed to move to open its default, the Circuit Court of Appeals has nevertheless opened the door for the State to present an application for leave to file its actual claim, if any, at the present time.

The State admits that no actual claim has been filed. The notice which the State filed (R., 19; petition 4) is not a proof of claim, either liquidated or unliquidated. It is a mere notice of an intention to file a claim if and when the State shall have information upon which a tax, if any, can be computed. The State must present an actual claim for a specific sum of money and must show that undistributed assets in the hands of the Trustee are sufficient not only to pay all administration expenses and claims duly filed and undetermined, but also to pay the claim of the State, in full or in part, without prejudice to other creditors, the amounts of whose claims in this case were to be paid in full to the Trustee by the purchaser of the assets. Thus far the State has not complied with any of these essential requirements.

On page 17 of its brief the State asserts that "There has been no prejudice to anybody." But proof to sup-

port that statement is wholly lacking in the record. On the same page the State italicizes the following statement: "The estate is in the same condition as it would have been had the State filed its claim within the limitation of time prescribed by the bar order," but the State fails to refer this Court and the respondent to any evidence in the record to support that emphasized assertion. The record contains merely an informal statement by the Referee, made at the hearing on June 24, 1931, to the effect that the then balance in the hands of the Trustee was $50,539.06 (R., 38, 47). But we have no proof in the record, however, other than that informal statement to show what the undistributed assets at that time amounted to. Substantial assets have already been distributed to creditors by way of dividends, a fact manifested by the contract made with the purchaser of the bankrupt's assets and by the Referee's schedule of September 20, 1929 (R., 75-79, 87, 89-99).

There are many facts relating to the assets of the bankrupt which are not in the record for they do not bear upon the questions raised upon the appeal to the Circuit Court of Appeals. They would, however, have an important bearing upon any motion to open the State's default under the tax bar order addressed to the discretion of the Court. The moneys still in the possession of the Trustee are subject to the payment of the Trustee's commissions, the fees of the attorneys, the Referee's fees, and other administration expenses, and subject also to the possible payment of certain other claims which have been disputed and which are being litigated.

This is a unique bankruptcy. The assets of the bankrupt were sold to a purchaser which, pursuant to its contract with the Trustee, approved by the Court, paid to the Trustee the full amount of all claims filed

with and allowed by the Referee on or before September 19, 1929, which date was thirteen days after the expiration of the statutory six months' period for the filing of claims (R., 91). The tax bar order served upon the State of New York expired September 16, 1929, and if the State had filed its claim in compliance with the provisions of the tax bar order, the amount of that claim, if allowed by the Referee, would have been paid in full to the Trustee by the purchaser of the assets. If objected to, payment of the claim would have been secured by the purchaser of the assets (R., 91, 92). No creditor would then have been prejudiced by the payment of any claim of the State (R., 75-79, 87, 89-99). Pursuant to the agreement made with the purchaser of the assets, the Referee on September 20, 1929, prepared and signed a schedule of claims filed with him enumerating the claims allowed without objection, the claims allowed and against which objections or petitions for reconsideration had been filed, and the claims allowed and later amended or reduced by order of the Referee (R., 99, 100). The State of New York, having failed to file a claim for any additional franchise tax liability for the tax years "beginning November 1, 1927, to 1928 inclusive," its claim, whether allowed or objected to, could not be and was not included in the schedule prepared by the Referee, pursuant to the contract made by the purchaser.

In the present case the Trustee, relying on the bar order and the failure of the State to comply with its terms, disbursed by way of dividends $328,000, as indicated by said contract made with the purchaser and by the Referee's schedule. Had the State filed in time an actual claim for a definite amount, the Trustee would have obtained from the purchaser of the assets cash or security to cover the claim of the State, if and when allowed.

In *In re Morgenstern & Co.*, 57 Fed. (2nd) 163 (Circuit Court of Appeals, Second Circuit) the Court said on page 164:

> "The Government contends that the order barring it from filing claims for taxes after October 11, 1930, and from sharing in the assets of the estate except as to claims so filed does not affect assets still undistributed. But we know nothing about the extent or even the existence of such undistributed assets. It may be that assets have already been distributed to creditors by way of dividends which ought to have been retained for other purposes if the estate was to be subject to the deduction of the income taxes in question. While counsel say that there are still undistributed assets, we ought not to go on mere general statements which are not of record, and, without definite facts, ought not to treat the proof of claim as an application for a modification of the so-called 'bar order'."

In the *Morgenstern* case just cited the Government filed an actual claim for a definite amount. In the present case no actual claim has been filed and even if the record contained definite proof of the amount of the undistributed assets in the hands of the Trustee, the Court would be unable to determine whether or not those assets, after the payment of administration expenses, would be sufficient to pay the claim of the State which is now nebulous, uncomputed and undetermined.

VI.

The cases cited by the petitioner are not in point. There is no conflict among any of the Circuit Courts of Appeals as to the power of the Court to make tax bar orders.

In none of the cases cited by the State were the facts similar to those in the present case. In all of those cases the tax claims were actual claims for definite amounts. In the present case no actual claim was filed. There was filed merely a paper embodying a notice of an intention to file a claim and not a proof of claim complying with the requirements of Section 57 of the Bankruptcy Act. In none of the cases cited by the State were funds supplied, as they were in the present case, by a purchaser of the assets of the bankrupt sufficient to pay in full all claims duly filed and allowed within a specified time together with security to cover the payment in full of all claims duly filed within such time and objected to.

No provision has been made for the payment of claims of general creditors filed or sought to be filed after the expiration of the statutory six months' period for the filing of claims of such creditors or for the payment of any claims of the Federal or State Governments filed after the expiration of tax bar orders. To permit tax claims to be filed after the expiration of tax bar orders in this matter and then to be allowed would deprive the general creditors of the dividends guaranteed to them by the contract made with the purchaser of the assets, which contract had the approval of the creditors and of the Court. The State was vigilant in filing its original claim for One Thousand Three Hundred Seventy-two and 37/100 Dollars (R., 23), and if it had been equally vigilant in the filing of any claim for additional taxes within the time re-

quired by the bar order, the purchaser of the assets would have supplied such additional cash or security as would have been necessary to insure payment of the State's additional claim, if and when allowed.

There is no conflict of opinion between any of the Circuit Courts of Appeal as to the propriety under the law of issuing tax bar orders against the Federal Government and against any State Government. In some cases, including some of those cited by the State, the Circuit Court of Appeals has held that a tax bar order will be lifted if the United States or a State, as the case may be, should file an actual claim and if funds remained in the hands of a Trustee sufficient to pay such claim without prejudice to other creditors.

On page 21 of its brief the State citing the case of *In re Bates Machine & Tractor Co.*, 8 Fed. (2d) 424 (District Court, N. D. Illinois, E. D.), asserts that in that case "the facts are somewhat similar to the present case under review". The two cases are essentially dissimilar. In the *Bates* case an actual claim for $24,559.92 additional income tax was filed after the tax bar order had expired. In the present case no actual claim was ever filed after the tax bar order had been made and served. There are other points of dissimilarity between the two cases which need not be detailed.

On page 19 of its brief the State cites the case of *Employers Liability Assurance Corporation* v. *Astoria Mahogany Co.*, 6 Fed. (2d) 945, and asserts that that case was a decision "by this Court". That case was not decided by this Court but by the Circuit Court of Appeals, Second Circuit.

Conclusion.

The adjudication in bankruptcy in this matter took place on March 6, 1929. The time for general creditors to file claims expired September 6, 1929. The tax bar

order in question was served on the State on July 18, 1929, and required the State to file its proof of claim, if any, within sixty days, which expired September 16, 1929. The State's notice of intention to file a claim was filed on October 20, 1929. The motion to expunge the notice was returnable before the Referee on April 9, 1931, and during the long interval of one year and seven months between the date of the filing of the notice and the date of the motion the State did nothing with respect to its alleged claim. Nor has the State done anything with relation to its claim, if any, since the granting of the motion by the Referee other than to appeal from his order. It is now over three years and six months since the adjudication of the bankrupt and the estate is still open. Judge Coleman of the District Court, in his opinion affirming the Referee's order, said:

> "The notice of claim was filed more than a month after the expiration of the tax bar period and for that reason must be expunged. The State had made no application to open its default and for leave to file a claim after the time provided by the bar order. It is impossible to determine upon the papers before me whether such application should be granted when it is made. Certainly the State has been extremely dilatory and remiss in regard to this matter. That may not in itself be sufficient to deprive it of the right to share in the undistributed assets because it does not sufficiently appear how such conduct may have prejudiced others. 85% of the assets have already been disbursed, but there still remains approximately $50,000. To permit this sum to be tied up for an indefinite period in the future because of an unliquidated claim by the State which the latter is doing nothing to have determined would be a gross injustice to the creditors who unquestionably at this time could make good use of their money. Judging by

> the State's conduct in the past in this matter, if the claim is not expunged the fund will remain in the Court for years to come" (R., 110).

The petition on the State's present application was verified August 10, 1932, and contains no allegation that even at this late time, three years after the expiration of the bar order, the State is ready and able to file an actual claim. The State now seeks further to delay indefinitely the time for the closing of the estate of the bankruptcy by the Trustee and by the bankruptcy court by keeping open unconditionally its time for the future filing of an unknown, unascertained, and perhaps non-existent and unprovable claim.

The application for the writ of certiorari should be denied with costs.

Dated, New York, September 8, 1932.

Respectfully submitted,

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S. John Block,
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Robert Halpern,
With him on the brief.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1932.

No. 304.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC.,
Respondent.

BRIEF FOR RESPONDENT.

S. JOHN BLOCK,
Counsel for Respondent.

S. JOHN BLOCK,
ROBERT HALPERN,
of New York, on the Brief.

LODER PRINTING CO., INC., 63 Duane St., N. Y. C., WORTH 2-0689

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Supreme Court of the United States

OCTOBER TERM—1932.

THE PEOPLE OF THE STATE OF NEW YORK, Petitioners, AGAINST IRVING TRUST COMPANY as Trustee in Bankruptcy of EXPERIMENTER PUBLISHING CO., INC., Respondent.	No. 304.

BRIEF FOR RESPONDENT.

(**Note:**—The petitioner has informed the respondent by letter that it will not file any additional brief in the Supreme Court but will argue the case on the brief filed in connection with the application for certiorari. For this reason the respondent will include in this brief a statement of the case and will be unable to answer any specific assignment of errors as are intended, pursuant to Rule 27, subdivision 2(e) of the Rules of this Court, to be argued by the petitioner.)

I.

Opinions of the Courts Below.

The opinion of the referee has not been reported. It appears in the printed record (R. 61).

The opinion of the United States District Court, Southern District of New York (Hon. Frank J. Coleman, District Judge), has not been reported. It appears in the printed record (R. 65).

The opinion of the United States Circuit Court of Appeals, Second Circuit, is reported in 58 Fed. (2d) 980, and appears in the printed record (R. 69).

II.

Statement of the Case.

Experimenter Publishing Co., Inc., was adjudicated a bankrupt on March 6, 1929 (R. 13). Section 57-n of the Bankruptcy Act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication.

On March 29, 1929, the State of New York filed with the referee in bankruptcy a claim for unpaid franchise taxes amounting to $1,372.37, to which claim objection was made. At the same time the State of New York filed a notice of an unliquidated claim for franchise taxes for the tax years beginning November 1, 1928 (R. 10, 12).

Pursuant to the unanimous approval of the creditors of the bankrupt present or represented at a special meeting of creditors held April 3, 1929, after due notice, as provided by the Bankruptcy Act, the District Court through the referee made two orders confirming the sale by the trustee to certain purchasers of the assets of the bankrupt, upon the following terms: The purchasers to pay in cash on September 20, 1929, to the trustee the full amount of all claims filed with and allowed by the referee, as shown by a certificate of the referee to be delivered not later

than September 19, 1929, by the trustee to the purchasers, and the purchasers to furnish security for the payment in full of all claims filed but not yet allowed or whose status was otherwise still undetermined as shown by such certificate of the referee (R. 45, 46, 54, 55).

The date September 19, 1929, was 13 days after the expiration of the statutory six months' period for the filing of claims and 3 days after the expiration of the so-called tax bar order made July 1, 1929, and hereinafter described.

On July 1, 1929, an order was made by the District Court through the referee requiring the State of New York to file within 60 days after the service of said order proof of any or all claims of the State of New York against the bankrupt and providing that, upon failure to file such a claim within the time specified, the State of New York be forever barred from asserting any claim against the estate of the bankrupt or against the trustee or against the funds in the hands of the trustee (R. 8). Said order with notice of entry thereof was duly served on July 18, 1929 (R. 13).

On October 20, 1929, the State of New York filed a notice of an unliquidated claim for franchise taxes for the tax years beginning November 1, 1928, and for additional franchise taxes for the tax years beginning November 1, 1917 to 1928, inclusive. Said notice contains the statement "claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes." (R. 11, 13.)

On or about March 30, 1931, the trustee moved before the referee to expunge the two notices of unliquidated claims filed by the State. The referee granted the motion

to expunge as to the notice of an unliquidated claim for taxes dated October 17, 1929, and an order to that effect was made by the referee on September 2, 1931 (R. 3).

The People of the State of New York petitioned for a review of the order of the referee expunging the notice of the unliquidated claim filed October 20, 1929. Upon review by the District Court the order was in all respects affirmed (R. 2).

Upon appeal by the People of the State of New York from the District Court to the Circuit Court of Appeals, the order of the District Court was unanimously affirmed. In its opinion the Circuit Court of Appeals said:

> "Upon the authority of these cases the order appealed from is affirmed but without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment." (R. 70).

Upon the petition of the People of the State of New York, the Supreme Court allowed a certiorari to the Circuit Court of Appeals on October 17, 1932. (R. 71).

POINT I.

Inasmuch as sovereigns are not bound by ordinary statutes of limitation, courts of bankruptcy, in the exercise of their equity powers and for the purpose of effecting an orderly, just and expeditious administration of the estates of bankrupts, as required by various sections of the Bankruptcy Act, must of necessity issue orders fixing the time within which sovereigns must file their claims or be barred from participating in the distribution of estates of bankrupts.

Article I, Section 8, of the Federal Constitution conferred upon Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Section 57-n of the Bankruptcy Act provides that claims shall not be proved against a bankrupt estate subsequent to six months after adjudication. It has been conclusively determined by this Court that that section is not binding upon the Federal or State Governments because they are sovereigns, and are not specifically mentioned in that section. (*United States* v. *Birmingham Trust and Savings Bank*, 258 Fed. 562; writ denied, 251 U. S. 550. *Lewis* v. *United States*, 92 U. S. 618).

It is well established that when no tax bar order has been served upon a sovereign, it may file a claim at any time while assets of a bankrupt or an insolvent estate in equity remain undistributed. The effect of these decisions is to permit a sovereign to file a claim at any time before final distribution.

The bankruptcy courts found that in practice this right of the sovereign made it possible to delay indefinitely the administration of bankrupt estates.

Section 64 of the Bankruptcy Act reads:

> "Section 64. Debts which have priority.—a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality * * *.
>
> "b. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (6) taxes payable under paragraph (a) hereof."

The foregoing provisions of Section 64 presented a conflict with the decisions determining that sovereigns may file claims at any time before final distribution, for Section 64 requires the Court to order the trustee to pay and the trustee to pay claims having priority before payment of dividends to creditors.

To obtain the benefits of the statute granting priority to tax claims the tax creditors must comply with the orders of the bankruptcy court made pursuant to the general powers conferred upon it by the Act, and among these orders are tax bar orders, the very purpose of which is to bring before the Court claims of sovereigns and of other taxing powers to be proved and determined so that tax claims may be paid by the trustee before the declaration and payment of dividends to creditors. The right to enjoy special privileges, such as priorities for tax claims, may carry with it special obligations in the form of obedience to orders requiring tax claims to be filed within a specified time, in default of which the filing of such claims shall be barred. Indeed, unless such orders shall be made and be binding upon sovereigns and other taxing powers, a bankrupt estate may remain open and unadministered for years, thus circumvent-

ing the purpose of the Bankruptcy Act, namely, to effect an orderly, just and speedy liquidation and distribution of the estate of the bankrupt.

Since the sovereign is not bound by the six months' statutory period for the filing of claims, a sovereign or other tax creditor may deprive general creditors of dividends indefinitely unless such sovereign or other tax creditor shall be required by a tax bar order to file its claim, if any, within a specified time or be barred.

In the present case the State contends that it had the right to file tardily a claim for taxes inasmuch as undistributed assets were at the time still in the hands of the trustee. The paper which the State filed, however, on October 20, 1929, as will be seen, was not a proof of an actual claim in the form prescribed by Section 57 of the Bankruptcy Act. It was a mere notice of an unliquidated claim for additional franchise taxes and of an intention to file a claim when the State should be in possession of such information as might be necessary to fix and determine the tax or taxes.

Section 2 of the Bankruptcy Act invests courts of bankruptcy with jurisdiction at law and in equity to:

> "(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * * (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; * * * Nothing in this sec-

> tion contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

The Courts have interpreted Section 2 of the Bankruptcy Act liberally and have held that the provisions of that section convey broad powers upon the bankruptcy court in connection with the administration of bankrupt estates. A few of the cases in which the provisions of Section 2 of the Bankruptcy Act were discussed will here be cited.

In *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, this Court said at page 217:

> "We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them * * *. A distinct purpose of the Bankruptcy Act is to subject the admintration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way as are the courts of bankruptcy."

In *Mitchell Store Building Co.* v. *Carroll*, 193 Fed. 616, appeal dismissed and writ denied in 232 U. S. 379, the Court said at page 620:

> "This provision (Section 2 of the Bankruptcy Act) must be given a free interpretation as con-

> veying 'broad powers' upon the bankruptcy court 'to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine otherwise in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy'."

In *In re Wood & Henderson,* 210 U. S. 246, this Court said at page 254:

> "Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

Under the Bankruptcy Act, the referees are invested with, among other powers, the jurisdiction to perform such acts and duties as is conferred on courts of bankruptcy except as to questions arising out of the applications of bankrupts for compositions or discharges and except as may otherwise be provided in the Act. (Bankruptcy Act, Section 38).

In *William Filene's Sons Company* v. *Weed,* 245 U. S. 597, receivers in equity were appointed. The Court without statute took possession of all of the assets of the corporation to satisfy its debts. No statute prescribed the time for the proof of claims. This Court said at page 601:

> "When a statutory system is administered, the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors or for introducing sup-

> posed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. *In order to make a distribution possible, they must of necessity limit the time for the proof of claims.*" (Italics not the Court's.)

In bankruptcy we have a statutory provision prescribing the time within which general creditors must file their claims, but this provision is not binding upon sovereigns and for this reason the bankruptcy court in the proper exercise of its equity powers must, as in the *Filene* case just cited, of necessity limit the time for the proof of claims by the sovereign in order to make a distribution of the bankrupt's assets possible.

When we consider the command of the statute (Bankruptcy Act, Section 64) that debts having priority shall be paid in advance of the payment of dividends to creditors, *i.e.*, prior in time to the payment of dividends to creditors, we realize that the bankruptcy court must be clothed with the power to determine speedily the taxes which are to be paid before dividends to creditors may be declared. The argument of the State in this case reduced to its essence is that the filing by it of a notice that taxes may be due stays the declaration of all further dividends from the time of the filing of the notice and that the estate cannot be closed until the State's claim, *if any*, is filed and determined. The argument goes further and contends that bankruptcy courts are powerless to speed the determination of tax claims and the final distribution of the estate. The State maintains, further, that the administrative functions of the courts of bankruptcy must be paralyzed until the sovereign, at its leisurely pleasure, may decide that the time has come for it to file a claim which can be litigated. The argument of the State is almost, if not actually, self-refuting.

This Court has in a number of analogous cases determined that the courts of bankruptcy have powers implied from the Bankruptcy Act to ascertain the validity and amount of liens and to decree the method of their liquidation (*Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, at page 738); to inquire into the validity of liens, marshal them and control their enforcement and liquidation (*Straton* v. *New*, 283 U. S. 318, at page 321); to sell real estate of bankrupts free from liens of State taxes, transferring the liens from the property to the proceeds of sale (*Van Huffel* v. *Harkelrode*, 284 U. S. 225).

In *Van Huffel* v. *Harkelrode, supra,* this Court said at page 227:

> "The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by Federal courts sitting in equity when ordering sales by receivers or on foreclosure * * *. The lower Federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by Section 2 of the Bankruptcy Act, to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.
>
> "No good reason is suggested why liens for State taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine 'the amount or legality' of any tax * * *. Realization upon the lien created by the State law must yield to the requirements of bankruptcy administration."

The power to issue tax bar orders must be inferred from the general powers of the bankruptcy court to ascertain the amounts and priorities of claims of all creditors of a bankrupt and to effect a just and expeditious distribution of a bankrupt's estate among his creditors. As in the *Van Huffel* case, just cited, the State's tardy and uncertain claim for the payment of taxes of an unascertained amount "must yield to the requirements of bankruptcy administration."

In the present case, it does not appear that any diligent effort was made by the State to ascertain and compute the amount of its claim, if any, or to obtain an extension of time within which it might comply with the provisions of the tax bar order upon a showing of any alleged inability to comply with its provisions within the period of 60 days provided by the order.

POINT II.

The issuance and binding effect of tax bar orders have been consistently upheld by all Circuit Courts of Appeals to which the question of their validity has been presented.

In the case of *In re Anderson*, 279 Fed. 525 (C. C. A. 2nd), a trustee in bankruptcy moved for an order directing the United States to file a claim or be barred. The United States appeared specially and moved for a denial of the motion on the ground that the Court was without jurisdiction to make such an order. The trustee's motion was granted and on appeal the referee's bar order was affirmed, the Circuit Court of Appeals saying at page 529:

> "The United States must file its claim for taxes as any other creditor, if it desires to

> share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of Section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter (D. C.)* 131 Fed. 546."

Section 64-a of the Bankruptcy Act relates not only to claims for taxes due to the United States, but also to claims for taxes due to any state, county, district or municipality, and what was said in the *Anderson* case, just cited, applies with equal force to the present case involving, as it does, a possible claim for taxes alleged to be due to a State.

In *In re Stavin,* 12 Fed. (2d) 471, Judge Thacher, now Solicitor General, said with reference to tax bar orders at page 473:

> "But under Section 64-a, taxes legally due and owing by the bankrupt must first be deter-

> mined and ordered paid. For this purpose the bankruptcy court may by proper notice bring the state and the United States before it to the end that claims for all taxes legally due and owing may be ascertained and their validity determined. In the *Anderson* case, *supra*, this was done by an order similar to the orders here in question. Such orders are proper and clearly within the jurisdiction of the court in the exercise of its power under Section 64-a."

In *Matter of Morgenstern & Co., Bankrupt*, 57 Fed. (2d) 163 (C. C. A. 2nd), the Court affirmed an order of the District Court confirming an order of a referee expunging a claim filed by the Collector of Internal Revenue, and the Court said at page 164:

> "But, under our construction of Section 64-a of the Bankruptcy Act, the bankruptcy court, in aid of speedy administration, might limit the time within which the Government might prove its claim against the estate. If the Commissioner, because of existing exigencies, required more time to make his assessment, application should have been made to the court to modify its order so as to extend the time to file proof of claim. In default of such an extension the order barring claims would protect the trustee in distributions of assets made while it stood. Any other interpretation of its effect would enable the Government to take its time in presenting claims for taxes, and would thus destroy the very advantages which orders limiting the time to file tax claims have been designed to prevent."

In *In re Villere* v. *United States*, 18 Fed. (2d) 409 (C. C. A. 5th; writ denied 275 U. S. 532), the Court held that the United States was not barred by Section 57-n of the Bankruptcy Act and expressly distinguished the *Anderson* case. In the *Villere* case, however, no bar order had been made and the trustee

sought to expunge the government's claim when the government attempted to file a proof of claim after the one year period (now six months under the statute as amended). The Court said at page 410:

> "The trustee may, by proper notice served on the collector, require him to file his claim within a time fixed, or otherwise be barred, to the end that settlement of the estate may not be unreasonably delayed."

Apparently, this Court, in denying a motion for certiorari in the *Villere* case, approved the ruling of the Circuit Court of Appeals to the effect that the sovereign was not barred by Section 57-n of the Bankruptcy Act in having failed to file its claim within the statutory period for the filing of claims by general creditors and to the further effect that the trustee may, by proper notice or order, require the sovereign to file its claim within a time fixed or be barred.

In *In re J. Menist Co., Inc.*, 294 Fed. 532 (C. C. A. 2d; writ denied 265 U. S. 591), a trustee in bankruptcy sought to expunge two claims of the United States which had been filed after the expiration of the general statutory period (Bankruptcy Act, Section 57-n). The trustee's motion was denied. The Circuit Court of Appeals affirmed the order of the District Court and said at page 533:

> "We appreciate that Section 57-n is one of the provisions of the Bankruptcy Act which has for its purpose an expeditious winding up of a bankruptcy estate; but, under our decision *In re Anderson*, 279 Fed. 525, the trustee may avail of a simple and practicable method whereby the United States receives notice and thus is required promptly to prove its claim for taxes. The practical difficulties which would attend the requirement that the government

> should be held to the statutory limitation of Section 57-n are so great that we see no warrant for assuming that Congress intended, in that regard, any departure from the rule that the United States of America must be named before it can be bound by a statute of limitations."

A tax bar order names the sovereign sought to be bound by its provisions. Such an order is not general in its terms as is Section 57-n.

This Court denied a petition for certiorari in the *Menist* case and in so doing found no error in the ruling of the Circuit Court of Appeals to the effect that Section 57-n does not bind a sovereign and that the trustee may, however, resort to the issuance of a tax bar order to bind the sovereign and to require the sovereign promptly to prove its claim for taxes within the time specified in the order or be barred.

We see that this Court has in at least two instances, the *Villere* case and the *Menist* case, both above cited, denied applications for certiorari in cases in which the Circuit Court of Appeals of different Circuits gave its express approval to the issuance of tax bar orders. If it should be said that such approval was expressed in dicta of the Circuit Court of Appeals, those dicta, going to the very essence of the question before the Court, doubtless had the approval of this Court upon the denial of the applications for certiorari, for, had those important dicta incurred the criticism of this Court, this Court would doubtless have granted applications for certiorari for the purpose of annulling precedents established by repeated dicta of the Circuit Court of Appeals which would serve as guides to and be followed by the District Court in many similar cases.

In *United States* v. *Middle States Oil Corporation*, 18 Fed. (2d) 231 (C. C. A. 8th), a case involving an

equity receivership, the Federal Government failed to file a claim for alleged taxes according to the rules and notices prescribed by the Court. The United States government argued that the Court had no power to require the United States to file a claim within any particular time, that it was not bound by any statute of limitations and was not subject to the doctrine of laches because the public interest should not be prejudiced by the negligence of officers or agents of the government. The government contended that it had the right to file a claim for taxes at any time whatsoever regardless of any orders or rules of procedure of the District Court. The Circuit Court of Appeals said at page 238:

> "We do not so understand our general scheme of government. The situation is not one involving any statute of limitations or any question of laches, but it involves the question of whether the administrative branch of the government may ignore and refuse to accede to rules of the judicial branch made for the purpose of carrying on orderly judicial procedure and administering justice."

The question of the necessity for and the propriety of issuing tax bar orders in bankruptcy cases has been presented in a number of cases to the Circuit Court of Appeals of the Second, Fifth, Sixth and Eighth Circuits and in every instance the Circuit Court of Appeals gave its approval to the general principle of the legality of tax bar orders and their binding effect upon sovereigns. (*In re Anderson,* 279 Fed. 525 (C. C. A. 2nd); *In re J. Menist Co., Inc.,* 294 Fed. 532 (C. C. A. 2nd; writ denied 265 U. S. 591; *Matter of Morgenstern & Co.,* 57 Fed. (2d) 163 (C. C. A. 2d); *In re Villere* v. *United States,* 18 Fed. (2d) 409 (C. C. A. 5th), writ denied, 275 U. S. 532; *United States*

v. *Elliott,* 57 Fed. (2d) 843 (C. C. A 6th); *United States* v. *Middle States Oil Corporation,* 18 Fed. (2d) 231 (C. C. A. 8th).)

In *United States* v. *Elliott,* 57 Fed. (2d) 843 (C. C. A. 6th), a trustee in bankruptcy moved for an order directing the United States to file its claim, if any, for taxes on or before a day certain or be barred. The referee granted the motion and his order was affirmed by the District Court. The Circuit Court of Appeals reversed the District Court and said at page 844:

> "Neither the amount nor legality of the claim was questioned, and at the time it was stricken there remained in the court, undistributed, funds sufficient for its payment. We think the court erred in disallowing the filing of the claim. We do not think that the right of the Government to file its claim and have it considered on its merits by the court was unconditionally destroyed by the bar order. Such orders were sustained in *In re Anderson,* 279 Fed. 525, 527, C. C. A. 2, and in *In re Stavin,* 12 Fed. (2) 471, 473, D. C. They lie in the inherent power of the court. They are analogous to the usual orders in creditors' suits and insolvent proceedings in chancery whereby claimants are required to come in within a limited period or be excluded from participation in assets. *Daniels Chancery Practice, 4th American ed., Vol. II, p. 1204.*
>
> "But such orders in bankruptcy are within the control of the court until the termination of the case and may be revoked if no one suffers injury thereby. *In re Ives,* 113 Fed. 911, 913, C. C. A. 6; see also *People* v. *Hopkins,* 18 Fed. (2) 731, 733, C. C. A. 2. We think the circumstances here call for an application of this principle. The fund being in court, the taxes may yet be paid and the Trustee have credit therefor, as provided by Sec. 64-a, Bankr. Act * * *. It has been the practice of equity courts to abrogate the time limit for filing claims where

> a reasonable explanation is offered for failing to comply and to let in claimants upon such terms as might be imposed as long as the fund is in court."

The *Elliott* case, just cited, is distinguishable in several respects from the case at bar. In the *Elliott* case the government presented a claim for a specific amount and the claim was not questioned by the trustee. In the present case the claim which was expunged was a notice of an unliquidated claim, the notice containing a statement of an intention on the part of the State thereafter to file a claim "as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes" (R. 11). That notice did not comply with Section 57 of the Bankruptcy Act relating to the proof and allowance of claims for it did not set forth any actual claim consisting of a statement under oath in writing "setting forth the claim, the consideration therefor, and whether any, and if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor." In the present case, therefore, the legality of the notice of claim was questioned. In the present case it does not appear that there remain in the Court undistributed funds sufficient for the payment of the claim, if any, the amount of which has not been ascertained and is not before the Court.

The present case is further distinguishable from the *Elliott* case inasmuch as the State has offered no reasonable explanation for its failure to comply with the provisions of the bar order. In the *Elliott* case the Court said that a bar order "*may be revoked if no one suffers injury thereby,*" but in the present

case, if the bar order should be annulled, great and irreparable injury would be suffered by the diligent creditors who filed their claims within the statutory six months' period and who approved the contract for the sale of the assets of the bankrupt at the price of 100 cents on the dollar for every claim duly filed and allowed (R. 45, 46, 54, 55).) The State ignored the provisions of the bar order and weeks after the time provided for the making and delivery of the referee's certificate with respect to the claims filed and objected to the State filed not a proof of claim but a notice of an unliquidated claim for additional franchise taxes with notice of intention thereafter to file a claim. It is now well over three years since the State defaulted in complying with the provisions of the bar order. If at this time, after its gross laches, the State should be permitted to file a claim for additional franchise taxes, such claim, if allowed, would deprive the vigilant creditors, whose claims were filed in due time and allowed, of a portion of the dividends accruing to them pursuant to the contract made with the purchasers for the payment to the trustee of the full amount of those claims. A reversal of the order of the Circuit Court of Appeals herein would be tantamount to a nullification of the two orders of the District Court made April 10, 1929, following the unanimous action of the creditors at their special meeting, which orders approved the contract for the sale of the assets whereby the creditors were assured payment of 100 cents on each dollar of their claims. The record does not show that the two orders of April 10, 1929, have ever been attacked by the State or by any other party. Had the State filed its claim, if any, for additional franchise taxes within the period provided by the tax bar order and prior to September 19, 1929, the purchasers of the assets would, pursuant

to the contract approved by the orders of April 10, 1929, have been required to furnish cash or security sufficient to pay the State's claim in full. The contract with the purchasers and the orders of April 10, 1929, were matters of record with knowledge of which the State was charged. Indeed, the State had filed on March 29, 1929, a claim for franchise taxes amounting to $1,372.37 and an unliquidated claim for franchise taxes for the tax years beginning November 1, 1928 (R. 10, 12). Those claims were filed prior to the special meeting of creditors held April 3, 1929, at which the sale of the assets was approved, and prior to the making of the two orders of April 10, 1929. The State thus presumptively had notice of the proceedings in the bankruptcy court with regard to the sale of the assets of the bankrupt and the terms of sale. The State's failure thereafter to comply with the provisions of the tax bar order was inexcusable. It should be noted further that the record is devoid of any evidence of any attempt made by the State to open its default and to offer a reasonable explanation for its failure to comply with the bar order. It may be added that the affirmance of the order of the Circuit Court of Appeals by this Court would still permit the State, as provided by the decision of the Circuit Court of Appeals, to make an application "presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment." (R. 70).

In *Employers Liability Assurance Corporation, Ltd.* v. *Astoria Mahogany Co.*, 6 Fed. (2d) 945 (C. C. A. 2d), a case involving an equity receivership, the District Court made an order requiring all creditors to file claims within 60 days or be barred. No sovereign was specifically named in the bar order. After 60 days a motion made by the United States for permission

to file a claim was denied by the District Court whose order was reversed by the Circuit Court of Appeals solely on the ground that the order to creditors was not specifically directed to the sovereign. The Circuit Court of Appeals said, citing *In re Anderson, supra,* that possibly the same course is open to a receiver under a creditors' bill as is open to trustees in bankruptcy and that there is an obvious difference between that and a decree for general limitation.

In *People of the State of New York* v. *Hopkins,* 18 Fed. (2d) 731 (C. C. A. 2d), an action in equity, the Court issued a general order limiting the time within which creditors should file claims but not specifically naming the State of New York, and the Circuit Court of Appeals, following *Employers Liability Assurance Corporation* v. *Astoria Mahogany Co., supra,* held that such an order would not preclude the State from subsequently presenting its claim for taxes. The Court said at page 733:

> "If, before distribution is actually made, a creditor appears and satisfies the court that he is justly entitled to share in the assets on hand, his delay in presenting the claim should not bar him *unless someone has been injuriously mislead thereby.*"

In the present case the Circuit Court of Appeals for the Second Circuit affirmed the order of the referee precluding the State from sharing in the assets "without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right to payment." The State may still share in the undistributed assets if it can show that its failure to file its claim within the time limited by the bar order did not prejudice the creditors.

The *Hopkins* case is in accord with other decisions of the Circuit Court of Appeals respecting tax bar orders in holding that the failure of the sovereign to obey the mandate of the tax bar order will be excused if the sovereign can prove that its failure was not prejudicial. In this case the question of prejudice was not litigated on the motion to expunge the notice of claim and therefore the Circuit Court of Appeals quite properly affirmed the order expunging the claim but left open to the State an avenue of possible escape from the results of its own tardiness.

The referee in the present case, in expunging the claim of the State of New York, relied upon the case of *In re Mutual Parlor Suite Co.*, 11 A. B. R., N. S. 116 (Referee McDonald, Eastern District of New York, affirmed by Judge Inch), in which the Referee followed the *Anderson* case decision, *supra,* and expunged a claim filed after the expiration of the 60-day period and refused to file another claim offered after the expiration of the 60-day period.

In *Matter of Bates Machine & Tractor Co.*, 8 Fed. (2d) 424, a 30-day tax bar order was made and served upon the United States government. The collector filed certain actual claims for definite amounts. The trustee objected to one of the claims on the grounds that it was barred by the tax bar order and the referee dismissed that claim. Judge Wilkerson of the District Court in Illinois distinguished the *Bates* case from the case of *In re Anderson, supra,* by stating that in the *Anderson* case the tax had been levied more than two years prior to the filing of the petition by the trustee and that in the *Bates* case the additional tax was not levied until after the date fixed in the tax bar order had expired and the tax was levied and the claim was filed long before the time for the declaration of the final dividend under Section 65-b had ex-

pired. Judge Wilkerson reversed the order of the referee expunging the claim. He said that, in his opinion, Section 64-a does not confer upon the referee power, express or implied, to make the tax bar order, but in making this decision Judge Wilkerson's ruling is at variance with the uniform rulings of the Circuit Courts of Appeals of various circuits upholding the right of the bankruptcy court to make tax bar orders. The *Bates* case, further, is distinguishable from the case at bar in that in the latter no actual claim for a definite amount was filed.

POINT III.

The paper expunged does not conform with Section 57 of the Bankruptcy Act governing the proof and allowance of claims.

The "notice of unliquidated claim" filed by the State of New York does not comply with the requirements of the Bankruptcy Act. It should be noted that the notice reads:

> "Please take notice that the State of New York has an unliquidated claim for franchise taxes * * *. Claim will be filed as soon as the necessary franchise reports can be obtained or such other information as may be necessary to fix and determine such tax or taxes."

In all the bankruptcy cases discussed in this brief and in the brief filed by the State of New York in connection with its application for certiorari the Courts were confronted with actual claims. Here we are not confronted with an actual claim. We have a mere notice of an intention to file a claim at some unnamed

and indefinite future time. There is no provision in the Act for the filing of such a notice, nor does such a notice accord in any way with the practice in bankruptcy proceedings.

The filing of claims is governed by Section 57 of the Bankruptcy Act which reads as follows:

> "Section 57. Proof and Allowance of Claims.—a. Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The act is explicit in providing for proofs of claims only. The filing of a notice of intention to file a claim is in no way a compliance with the Act and such notice is therefore a nullity. This uncertain, vague, and indefinite notice, if sanctioned, would place the trustee and the creditors in a dilemma. They could not attack the claim on the ground that it does not appear on the books of the bankrupt or on the ground that it is excessive. There is no claim here. If this notice had not been expunged and shall not remain expunged, the trustee and the creditors would be compelled to wait until the taxing authority should decide to file a claim, if such decision should ever be made. Such waiting could be for years and throughout infinity.

The vice of the notice filed by the State lies in the fact that it is not really a claim in itself but a mere notice of an intention to file a claim which may never be filed. Indeed, we see in this very case that the notice was filed tardily on October 20, 1929, that the motion to expunge it was not made until on or about March 30, 1931, and that during the entire interval of over one and one-half years the State

filed no actual claim, pursuant to its notice of an intention to file a claim. Nor does the State contend today that it has filed such an actual claim and it is now well over three years since the State filed the notice in question.

Must the trustee and the creditors wait indefinitely for the State to file a claim and shall the estate of the bankrupt remain indefinitely unclosed for this reason? The trustee and the creditors should not be compelled to delay the closing of a bankrupt estate because a creditor has failed to proceed in accordance with the Bankruptcy Act and the orders of the Court.

In the course of testimony taken before the referee upon the motion to expunge the notice filed by the State, the State's witness, Mr. Hutchins, testified on June 24, 1931, about one and one-half years after the State tardily filed the notice in question, that he is a corporation examiner of bankrupts, Department of Taxation and Finance (R. 22). Under cross-examination Mr. Hutchins testified:

> "Q. Have you made any attempt to bring on for hearing any of the claims you filed in this proceeding? A. No.
>
> * * * * * *
>
> Q. You stated that you learned in the early part of 1929 or prior to your going on vacation that the sale of the assets, including the books of the corporation, had taken place? A. Yes.
>
> * * * * * *
>
> Q. You say that your interpretation of the New York State tax statute is that no additional tax is due until the United States Government claim for taxes is finally determined? A. Until the matter is finally determined.
>
> Q. Then if the claim of the United States Government for approximately $31,000 should

be disallowed or reduced for any reason, you would not have a claim for taxes until that determination in this proceeding? A. That is correct.

Q. Therefore, you do not know how soon you will have any claim for taxes or whether you will have any at all? A. We know we have liabilities for taxes in some amount, a potential liability at least.

Q. Then as to the other ones for the year 1917 to 1928 additional taxes, if the Federal Government's claim is disallowed you have no claim for taxes? A. Correct.

Q. And until that is finally determined you cannot state positively whether you have or have not a claim for any amount? A. Unless the matter has been finally determined by a competent authority, if it has been settled by the Board of Tax Appeals and no review is taken, we will be in a position to file a claim. We do not know if the matter will be terminated in this proceeding or compromised or what will happen. We would like to know that." (R. 31, 32).

Mr. Hutchins and the State's Tax Department knew that the Federal Government had filed timely its claim for approximately $31,000 in August, 1929. This information was discovered by the State prior to September 16, 1929 (R. 30, 31). The State was, therefore, in a position to file, if it so desired, a claim similar to that of the Federal Government before the expiration of the period of the bar order which had been served upon the State. The Federal Government's claim was filed timely and the security furnished by the purchasers of the assets covered that claim. The notice expunged was not filed by the State until after the expiration of the six months' statutory period, the expiration of the period of the bar order and the expiration of the time for the delivery of the referee's

certificate as to the claims duly filed, and therefore no security was furnished by the purchasers of the assets to cover the amount of the State's claim, if any, for additional taxes.

Because of the failure of the State to file and prove its claim, if it should really have a claim, other creditors of the bankrupt should not be penalized by having the declaration of a possible final dividend herein, already delayed for several years, delayed any longer. As Judge Coleman of the District Court said (R. 66) in his opinion affirming the order of the referee:

> "To permit this sum to be tied up for an indefinite period in the future because of an unliquidated claim by the State which the latter is doing nothing to have determined would be a gross injustice to the creditors who unquestionably at this time could make good use of their money. Judging by the State's conduct in the past in this matter, if the claim is not expunged the fund will remain in the Court for years to come."

POINT IV.

To prevent prejudice and irreparable injury to diligent creditors of the bankrupt the order appealed from must be affirmed. That order does not finally preclude the State from filing a claim.

That portion of the argument under Point II of this brief which relates to the contract made between the Trustee and the purchasers of the assets of the bankrupt shows clearly that if the order of the Circuit Court of Appeals should be reversed any claim hereafter filed by the State for additional franchise taxes pursuant to the provisions of the notice which was

expunged would deprive the vigilant creditors, whose claims were filed in due time and allowed, of a portion of the dividends accruing to them pursuant to the contract made with the purchasers for the payment to the Trustee of the full amount of those claims, which contract was approved by the two orders of the court made April 10, 1929 (R. 45, 46, 54, 55).

The Circuit Court of Appeals in its decision affirmed the order of the District Court "without prejudice to an application by the People of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment" (R. 70).

The State is thus permitted to proceed as if the tax bar order had never been made. If the facts so warrant the State may apply for leave to file an actual claim by showing that the Trustee still holds undistributed assets and that no injury would be done to any other creditor by permitting the State to share in those undistributed assets.

Conclusion.

The expeditious administration of bankrupt estates and the Bankruptcy Act itself require that the courts of bankruptcy have the power to order sovereigns to file their claims within a specified time or be barred from participating in the distribution of bankrupt estates. This power is found in the broad equity powers of bankruptcy courts and is necessarily implied in the Bankruptcy Act. This power has been sustained by all the Circuit Courts of Appeals to which the question has been presented. In this case the sovereign has not as yet filed a claim capable of being litigated. The mere filing by it of a notice that it may have a

claim is insufficient to say the further distribution of the estate.

The affirmance by this Court of the decision of the Circuit Court of Appeals would not finally preclude the State from filing a claim. All possible rights of the State have been safe-guarded by the decision of the Circuit Court of Appeals which, in spite of the State's default under the tax bar order, nevertheless gives to the State the right to make "an application presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the Trustee may contest the right to payment." (R. 70).

The order of the Circuit Court of Appeals should be affirmed with costs.

Dated January 5, 1933.

Respectfully submitted,

S. JOHN BLOCK,
Counsel for Respondent.

S. JOHN BLOCK,
ROBERT HALPERN,
of New York, on the Brief.

SUPREME COURT OF THE UNITED STATES.

No. 304.—October Term, 1932.

The People of the State of New York, Petitioners, *vs.* Irving Trust Company, as Trustee in Bankruptcy of Experimenter Publishing Co., Inc., Bankrupt.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 13, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Experimenter Publishing Company was adjudged bankrupt March 6, 1929. The Irving Trust Company became trustee. Upon its petition the referee, July 1, 1929, directed that "proof of any and all claims which the State of New York may have against the estate of the above named bankrupt," shall be filed within sixty days after service of this order; otherwise, they shall be forever barred. Proper service was had July 18, 1929.

October 20, 1929, the State filed notice of a possible demand for additional franchise taxes for 1917 to 1928 and stated that definite claim therefor would be presented when necessary reports, etc., could be obtained. No further proof has followed.

March 30, 1931, the trustee asked and obtained a referee order striking from his files the notice of October 20th. He held that the claim for taxes "cannot be filed after the expiration of the bar order date" and declared "The State has only itself to blame for the situation it finds itself in as the record indicates that facts were within its knowledge upon which it could have filed this claim prior to September 16, 1929." The District Court approved this action and the Circuit Court of Appeals affirmed its judgment, "but without prejudice to an application by the people of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right of payment."

The only question properly presented by the application for certiorari is whether the District Court had power to grant the motion to expunge. Petitioners claim that such power is incompatible with State sovereignty as defined in *Marshall* v. *New York*, 254 U. S. 380.

Nothing adjudged below conflicts with any thing said in *Marshall* v. *New York*. There we recognized the prior right of the State to be paid license taxes, unsecured by specific lien, from the assets of an insolvent estate. Here, no such question is presented.

The bar order against the State, as finally modified, may be revoked upon proper showing until termination of the cause—it remains within control of the court. See *United States* v. *Elliott*, 57 Fed. (2d) 843. And if the District Court has power to make any such order against a State, this one seems appropriate to the circumstances.

An ill digested brief for the State beclouds its present position. But we consider only the point relied upon in the petition for certiorari, and that is without merit.

The Federal Constitution clothes the Congress with power to establish uniform laws on the subject of bankruptcies.

The extant Bankruptcy Act—Section 2—declares the United States District Courts shall be courts of bankruptcy and undertakes to give them jurisdiction to adjudge persons bankrupt; to allow or disallow claims; to take charge of the property of bankrupts; to cause their estates to be collected, reduced to money and distributed; to determine controverises in relation thereto; to close estates when fully administered; and make such general orders as may be necessary for enforcement of the Act. Section 64 requires payment of taxes due to the United States, state, county, district or municipality in advance of dividends to creditors. Section 57, (n), provides that claims shall not be proved after six months subsequent to adjudication. Act May 27, 1926, c. 406, Sec. 13, 44 Stat. 666.

It is admitted here, that as the United States and the States are not mentioned in the limitation of Section 57, they are not bound thereby. The consequent necessity for bar orders is apparent. Otherwise, estates could not be promptly closed. *Lewis* v. *United States*, 92 U. S. 618; *United States* v. *Thompson*, 98 U. S. 486, 490; *New Jersey* v. *Anderson*, 203 U. S. 483; *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152; *United States* v. *Birmingham Trust*

& Savings Bank, 258 Fed. 562; *Villere* v. *United States*, 18 Fed. (2d) 409; *Wechsler* v. *United States*, 27 Fed. (2d) 850.

In re Wood & Henderson, 210 U. S. 246, 254—"Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court, to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

United States Fidelity & Guaranty Co. v. *Bray*, 225 U. S. 205, 217, —

> "We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them . . . A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way as are the courts of bankruptcy."

William Filene's Sons Co. v. *Weed*, 245 U. S. 597, 601, 602,—receivership in a court of equity which had possession of the corporate assets—

> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, ... [then] In order to make a distribution possible, they must of necessity limit the time for the proof of claims."

Van Huffel v. *Harkelrode*, 284 U. S. 225, 227—

> "No good reason is suggested why liens for State taxes should be deemed to have been excluded from the scope of this

general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine 'the amount or legality' of any tax. . . . Realization upon the lien created by the State law must yield to the requirements of bankruptcy administration."

The Federal government possesses supreme power in respect of bankruptcies. *International Shoe Company* v. *Pinkus*, 278 U. S. 261, 265. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.